National Association of
NAB
BROADCASTERS

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April 24, 2007

**Ex Parte Communication**

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20445

**Re: <u>MB Docket No. 07-57</u>**

Dear Ms. Dortch:

The National Association of Broadcasters respectfully requests that the attached sources for analysis of the proposed merger between XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc. be placed in the above-captioned record.

Respectfully submitted,

**NATIONAL ASSOCIATION OF BROADCASTERS**
1771 N Street, N.W.
Washington, D.C. 20036

Larry Walke

Attachment

## Newsroom: TV & Radio

# Public Interest Group Opposition to XM and Sirius Grows

03/20/2007

FOR IMMEDIATE RELEASE

**Public Interest Group Opposition to XM and Sirius Grows**

**Satellite Radio Does Not Compete with Other Traditional Listening Services**

Washington, DC— Public interest opposition to the proposed XM-Sirius Radio merger grew today as six non-profit consumer, free-speech and democracy organizations asked the Senate Judiciary Committee to urge tough regulatory scrutiny of the deal.

In a written statement (PDF) submitted to the Senate Antitrust Subcommittee today, Consumers Union, Consumer Federation of America, Free Press, Common Cause, Media Access Project, and Prometheus Radio Project said the proposed merger will reduce competition, jeopardize consumer choice and increase prices. The groups are members of the Media and Democracy Coalition, a coalition working to stop further media consolidation and guarantee that Internet and broadband access are affordable, accessible, and available to all.

The groups challenged XM and Sirius Radio's arguments that the satellite radio market competes with other listening devices, like broadcast radio, digital Internet content, and other mobile handheld devices.

"We urge Congress and regulators to look at the satellite marketplace and to be skeptical of the parties' unsupported arguments that other audio devices and service compete with satellite radio on price, product, and service," said Jeannine Kenney, a senior policy analyst with Consumers Union. "Satellite radio is a different experience— offering a unique mode of delivery and a unique product."

"What the satellite radio companies are selling is good pulp fiction, but it gets an F in antitrust analysis. It fails entirely to analyze the actual product and geographic market in which satellite resides," said Mark Cooper, Director of Research for the Consumer Federation of America. "Airplanes do not compete with automobiles and satellite radios do not compete with iPods. Satellite sells national, mobile, commercial free, unrestricted radio content, something local radio cannot do," added Cooper.

The six groups told the Judiciary subcommittee that it would be a mistake to assume that satellite radio is merely one product option in a larger media market. They urged Congress to tell the FCC and antitrust authorities to put the brakes on the merger unless and until significant questions on competition and consumer impacts are fully addressed and satisfactorily answered.

Contact:: Jennifer Fuson, CU, 202.462.6262

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**Wednesday, February 28, 2007**

## Consumer Groups Object to XM and Sirius Satellite Radio Merger

Washington, DC—Communications regulators and antitrust officials should reject the merger of XM and Sirius Radio unless the companies demonstrate that consumers and competition will not be harmed, according to the testimony of Mark Cooper of Consumer Federation of America (CFA). The testimony before the Intellectual Property Task Force of the U.S. House Judiciary Committee was presented on behalf of CFA, Consumers Union, and Free Press.

"The proposed merger of the only two satellite subscription radio companies -- XM and Sirius Radio -- should raise a red flag for the Department of Justice and the Federal Communications Commission (FCC) whose job is to promote competition and consumer choice in the marketplace," said Gene Kimmelman, Vice President of Federal and International Affairs for Consumers Union.

"Not only were XM and Sirius prohibited from merging as a condition of getting their licenses to use the public airwaves, but the enormous growth of satellite radio subscriptions at very substantial monthly charges and consumer equipment costs in just a few short years shows that this service could develop into a vibrant competitive market," added Kimmelman.

"The merging firms have hired an army of public relations specialists and lobbyists," said Mark Cooper, Director of Research for the Consumer Federation of America. "But, in the post-Abramoff era, lobbying muscle and political influence can no longer be allowed to short circuit careful analysis of the market or trump clear threats to the public interest."

"We remain unconvinced by the excuses we have heard offered to justify the merger," said Cooper. "Traditional broadcast radio, digital Internet distribution and mobile handheld devices, like iPods have not disciplined prices and will not discipline pricing practices after the merger because there are sharp differences in product quality, listener experiences and mode of delivery. They are not national, not mobile or not programmed," said Cooper. "Experience and careful analysis suggests that the effort to position satellite radio as merely one product option in a broader product market should be rejected."

Under the scant details released to date, it also remains unclear what additional equipment costs will be imposed on consumers as a result of the merger and whether, if consumers fail to invest in additional equipment, they will enjoy benefits the parties purport to provide to their subscribers.

"If these two competitors are allowed to merge, we fear prices will rise and innovation will suffer and the loose definition of product and geographic competition the antitrust authorities used to allow the merger will unleash an avalanche of merger across the digital product space," added Cooper.

**Click here to view the full testimony**

# # #

**Contact:**
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*Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to Provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance* *the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.*

*The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.*

*Free Press is a national, nonpartisan organization with over 350,000 members working to increase informed public participation in crucial media and communications policy debates.*

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Testimony of
**David A. Balto**

March 20, 2007

PRINTABLE VERSION

Testimony of David A. Balto before the Antitrust Subcommittee of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. The XM-Sirius Merger: Monopoly, or competition from new technologies? March 20,2007.

I appreciate the privilege to testify before you today about the anticompetitive effects arising from the proposed XM-Sirius merger. As I explain in my testimony, I believe that this merger poses the potential for significant anticompetitive harm in the satellite radio market by combining XM and Sirius, the only two providers of satellite radio. This merger would lead to higher prices, less service, less choice, and less innovation, and should not be approved by the Antitrust Division of the Department of Justice or the Federal Communications Commission regardless of any "regulatory promises" offered by the parties.

I have practiced antitrust law for over 20 years, primarily in the federal antitrust Enforcement agencies: the Antitrust Division of the Justice Department and the Federal Trade Commission.1 At the FTC in the 1990s I was attorney advisor to Chairman Robert Pitofsky and directed the Policy shop of the Bureau of Competition. In private practice and in government service I assisted in the litigation of numerous merger cases including StaplesIOffice Depot, British American Tobacco/American Tobacco, Heinz/Beech-Nut, BPIArco, Nippon SansoISemi-Gas, UPM KymmenneMactac, and SunGard Data Systems/Comdisco. In addition, I provided advice and guidance in numerous media mergers, including the FTC challenges to the Time Warner/Turner and Time Warner/AOL mergers. My testimony today is based on my years of reviewing proposed mergers as a government enforcer and providing advice and analysis on mergers as a private practitioner.

I want to begin my testimony with some basic principles which I think should guide the analysis of the potential anticompetitive effects of the XM-Sirius merger:

• In antitrust terms, a market is defined by those products or companies which effectively constrain the conduct of the merging parties. Simply because certain products seem similar to the products offered by the merging parties does not mean that they are in the same relevant product market. The purpose of the antitrust laws is to prevent anticompetitive conduct which may harm consumers; thus, the ability to constrain is essential to the question of which products belong in the relevant market.

• The antitrust laws protect not only competition in terms of price, but also competition in terms of service, choice, and innovation. This is especially important in media mergers, where competition may be primarily in terms of product variety, product offerings, and other forms of nonprice competition. The antitrust laws, especially the merger laws, protect not only against price increases but also against mergers that may dampen future price decreases. The Clayton Act prevents mergers that may tend to reduce competition and that includes mergers which may weaken future competition that will lower prices. The most problematic type of merger one that leads to monopoly. The creation of a monopoly is extremely problematic because the decisions by a monopolist to reduce service or increase prices, engage in price discrimination or other possible anticompetitive actions will receive very limited antitrust scrutiny post-merger, if any at all. Thus, antirust enforcement at the merger stage is the only way to protect competition and consumers in the merger-to-monopoly context. Often, regulatory, non-structural, relief is not an adequate substitute for requiring sustained competition between independent parties. The Clayton Act prohibits the attainment of market power by acquisition whether or not that market power is ever actually exercised and regardless of the supposed benevolent intentions of the merged parties. Agreeing to some form of regulatory relief to substitute for competition is a "Faustian" bargain which never pays off for consumers. On the rare occasions where regulators have agreed to these types of arrangements, they have regretted it because they received a brief gift in return for the cost -- in higher prices and less service -- of dealing with a long-term monopoly. For decades antitrust enforcers and courts have recognized that the "benevolent" intentions of a monopolist are not an effective substitute for the rigor of a competitive marketplace to ensure that consumers are not harmed from a merger.

Relevant market

Defining the relevant product market is the central issue in the competitive analysis of the XM-Sirius merger. The parties have suggested the market should be defined broadly to include all forms of audio entertainment such as terrestrial radio, music stored on iPods, radio websites on the Internet, and so forth. If one accepted that definition, conceivably the merger would be unlikely to pose significant anticompetitive affects, because the merged firm's share of the market would be small. If however, the market is defined more narrowly to include only satellite radio, there is a very significant likelihood of anticompetitive effects, since the merger would result in a monopoly. Where should the line be drawn? This is the difficult, but critical question that the Department of Justice and the Federal Communications Commission must answer.

In order to define a relevant market it is important to ask how satellite radio is different from other forms of audio entertainment? Lets start with the information contained on the parties own websites. In its answer to the question of how satellite radio differs from terrestrial radio, Sirius answers:

The biggest difference js that SIRIUS has 100% commercial-free music channels. What this means for you is that we offer you music the way it should be and the way the artist intended it: without a single commercial inteiruption. Our music programming also has a breadth and depth of programming basically unavailable on regular radio. We play the songs that you know and love, and many songs that we know you'll love when you hear them for the first time. We also have loads of original programming. We host h~~ndredosf exclusive live interviews and perfoimances you won't hear anywhere else and produce many interesting and engaging live talk shows in our national broadcast studios.'

Let me identify some additional factors that differentiate satellite radio from other forms of audio entertainment:

Aggregating Demand. Satellite radio has the breadth and depth of programming because it can aggregate demand unlike other forms of audio entertainment. One

of the most important aspects of satellite radio is that it aggregates demand to create the opportunity for new products that might otherwise not exist. As a forlorn fan of the Boston Red Sox exiled in Washington, let me use the example of radio broadcasts of the Boston Red Sox. It is not economically efficient for terrestrial radio stations in the Washington, DC area to broadcast the baseball games of the Boston Red Sox even though there are thousands of Red Sox fans in Washington. That is even more so the case in Boise, Idaho or Cheyenne, Wyoming, where there are only a handful of Red Sox fans. It is not financially feasible for terrestrial radio to serve such small pockets of demand. Satellite radio aggregates this demand to create the opportunities for a new product - the national broadcast of Red Sox baseball. If you look at the program offerings of XM and Sirius you will see countless other examples of niche programs, such as business or children's programming which simply could not exist without the ability to aggregate.
Ubiquitous service. Sattlelite radio follows you everywhere. Satellite radio travels with the person, assuring the same level of sound quality or content wherever you are. Unlike Internet based radio, satellite radio can travel with you in the car, on a hike, or on a beach. And satellite radio assures you the same content wherever you travel. Listening to Congressional hearings may be an acquired taste, but the only way I can listen to them on C-Span radio as I travel outside of Washington is by subscribing to XM radio.
Product variety. Satellite radio offers a far greater number of stations than terrestrial radio or even HD radio. As you know, XM has over 170 channels and Sirius has over 130. In the market with the greatest terrestrial radio stations - Los Angeles - there are only about 90 stations. That overstates their significance for two reasons: one can not hear all 90 stations in all parts of Los Angeles and, unfortunately, even these stations offer relatively homogeneous products. Terrestrial radio basically has six programming formats: news/talklsports, adult contemporary, contemporary hits, urban, Hispanic and country. Think about it: Even in a large cosmopolitan and affluent market such as D.C. there are no commercial classical music stations.
• Diverse, formulated programming. Satellite radio does not just broadcast various forms of entertainment. Rather satellite radio formats program content to provide diversity, introduce listeners to new music and new forms of entertainment. As the Sirius website notes 'No one can match SIRIUS programming. We've got legendary DJs playing your favorite songs on 69 channels of 100% commercial-free music, plus exclusive live performances and artist interviews." a Unregulated Content. The content of satellite radio is not regulated. This permits a wide variety of product offerings to satisfy consumer demand; satellite radio is not regulated or constricted by the rules of the FCC. (The fact that Sirius paid Howard Stem an $83 million bonus last year because Sirius added several million new listeners suggests that even Sirius believes that there is consumer demand for such unregulated content).

Based on these product characteristics - aggregating demand, ubiquitous service, product variety, diverse formulated programming, and unregulated content -- there are strong reasons to believe that the appropriate relevant market is satellite radio. It is important to recognize that what these parties offer is a unique service that goes beyond one method of audio entertainment. What XM and Sirius offer is a wide variety of commercial free entertainment, news, talk, weather, local traffic, business radio, live performances, and other audio options in a single format; in other words, the provision of a variety of audio entertainment in a single setting. Although certain parts of the satellite radio package can be acquired through other audio outlets, including web-based radio, digital media services, and terrestrial radio, no other service offers the complete variety of audio entertainment options offered by satellite radio.

Let me compare this to the StaplesIOffice Depot merger, which the FTC successfully enjoined a decade ago. In many ways that merger presented very similar issues to those raised with the proposed XM-Sirius merger. Two parties-Staples and Office Depot-which had developed a novel product that transformed the marketplace sought to merge. The two parties had risked a lot to create the market and often suffered losses. Their success led people to recognize the importance of office superstores. When the FTC announced the challenge to the merger, the parties and most commentators objected; observing that everything that could be purchased in a Staples or Office Depot could be purchased in another type of store or by mail order. In fact, less than 6% of all office supplies were purchased at a Staples or Office Depot. Thus, the parties strenuously argued that an office supply superstore market was far too narrow. But they did not prevail.

The Court observed "that it is difficult to overcome the first blush or initial gut reaction of many people to the definition of the relevant product market as the sale of consumable office supplies through office supply superstores. The products in question are undeniably the same no matter who sells them, and no one denies that many different types of retailers sell these products." But the court explained that "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." The Court then observed that the sale of consumable office supplies by office superstores was a relevant antitrust market, based on several factors including industry recognition of an office superstore category, evidence that pricing was far different at these office superstores, and that the stores had distinct formats and customers.

Let me start with just one of those issues - format. Back in 1997, not everyone shopped at office supply superstores and we thought Judge Hogan might have missed the opportunity. So the parties suggested that he visit several stores in Rockville, Maryland including a Wal-Mart, Staples, Office Depot, Target and other stores. The Judge concluded:

Based on the Court's observations, the Court finds that the unique combination of size, selection, depth and breadth of inventory offered by the superstores distinguishes them from other retailers. Other retailers devote only a fraction of their square footage to office supplies as opposed-to Staples or Office Depol. ,,.. . This was evident to the Court when visiting the various stores. Superstores are simply different in scale and appearance from the other retailers. No one entering a Wal-Mart would mistake it for an office superstore. No one entering Staples or Office Depot would mistakenly think he or she was in Best Buy or CompUSA. You certainly know an office superstore when you see one.

The Court effectively concluded that there was an office supply superstore market because what Staples and Office Depot offered was the opportunity to engage in a one-stop shopping experience where a wide variety of office supply needs could be purchased. It was not just the products being sold, but it was the shopping experience that defined the market.

Let me suggest that the members of this Committee do the same: compare satellite radio to the other alternatives. Certainly there are individual offerings of satellite radio you can secure in different modes of delivery. But what satellite radio offers that distinguishes it is the ease of usage, commercial free environment, high quality sound, and the cluster of audio entertainment services in a unique setting. Satellite radio provides consumers the opportunity to secure a wide variety of audio entertainment options in a single setting. For the consumer who might want to listen to sports, Broadway hits, local news, weather and traffic, business radio, live music performances, provocative talk radio, Christian radio and other forms of entertainment, satellite radio is the only alternative. To paraphrase Judge Hogan no one would mistake terrestrial radio for satellite radio.

The second critical issue in defining the market is what products constrain the pricing of satellite radio. Under the Department of Justice Merger Guidelines, the operative question that must be answered is if the merged firm increased prices by a small but significant amount for an extended period of time, what other products might constrain that price increase? In this case, we indeed have some evidence regarding the effects of price increases. During the second quarter of 2005, XM increased its monthly price from $9.99 to $12.95 to bring its price into parity with the price of Sirius-this represented an increase of nearly 30 percent. In the two quarters following that price increase, XM realized subscriber growth of 13 percent (third quarter 2005) and 20 percent (fourth quarter 2005). The fact that subscriber growth continued at such a rapid pace in the presence of 30 percent price increase suggests that other forms of audio media do not restrain prices and satellite radio faces a low elasticity of demand.

Much of the pricing evidence, as in the StaplesIOffice Depot case, is contained within the files of XM and Sirius and is not public. However, I did review the public information available, and could not identify a single new initiative adopted by XM or Sirius in response to iPods, HD Radio, digital media, or other music alternatives. This strongly suggests that satellite radio does not innovate-another form of competition-in response to the product offerings of different music listening formats, and thus these formats, are not part of the same product market.

Fundamentally, the merging parties are arguing that terrestrial radio is an alternative to satellite radio, and thus, in the same product market, because terrestrial radio is free. In other words, they're saying that even a satellite-radio monopolist could not raise prices because it would have to compete with a free service. As I have already shown, the pricing history of Sirius and XM undercuts this argument. Moreover, I do not think that argument recognizes the nature of the unique product offered by satellite radio. Let me provide a comparison. Twenty-years ago Coke attempted to acquire Dr Pepper and that merger was successfully challenged by the Federal Trade Commission. Coke argued that that relevant market included not simply cola flavored carbonated beverages, but rather a broader market of all fonns liquid refreshment, including water. Indeed, the parties there described the market in terms of "share of stomach" and suggested that Coke's and Dr Pepper's share of stomach was relatively small compared to all other liquid refreshment. The Court appropriately rejected that argument, recognizing that water and other beverages were not substitutes for Coke and Dr Pepper, but rather were compliments. Even though water was obviously free, it did not serve to constrain the potential exercise of market power by a combined Coke and Dr Pepper.

Let me provide another example. The parties may suggest that iPods are a competitive alternative to satellite radio. Yet consumers must pay 99 cents for each song downloaded from iTunes, to fill their iPods and must take the time to download the music and select the songs. Thus, an iPod with 1,000 songs would have approximately $1,000 worth of content, or approximately six and half years of the cost of an XM monthly service. Even then, the iPod would not have the selection of XM, nor the sophistication of the DJ mixes the radio content at XM provides, nor the new music that XM can introduce to the listener. The iPod cannot perform the important function of educating listeners by introducing them to new music and new forms of entertainment. I personally prefer the choices of Sirius' talented DJs to my own choices.

Many of these factors have led the Department of Justice, the FTC and the Courts to
narrowly define media markets in the past. Here are some of the examples of media markets defined by the agencies:

Cable television programming services (Time Warner/Turner merger (FTC 1996)).
Spanish language radio advertising (Univision/Hispanic Broadcasting (DOJ 2003))
Radio advertising (CBSIAmerican Radio Systems (DOJ 1998))
Movie theatres (Marquee HoldingsILCE Holdings (DOJ 2005))
Multichannel video program distribution (Direct TV/Echostar (DOJ 2002))
Local daily newspapers (McClatchy/Knight Ridder (DOJ 2006))
Alternative weekly newspapers (Village VoiceNT Media (DOJ 2003))
Broadcast TV spot advertising (News Corp./Chris-Craft (DOJ 2001))

Let me just discuss one of these mergers, because I think it illustrates the importance of precisely defining markets in media cases in order to fully recognize consumer preferences. In Marquee Holdings, the Department of Justice and several state attorneys general challenged the merger of the major movie theatre chains in Chicago, Seattle, New York, and Boston. A significant question was whether other forms of entertainment, including the rental or purchase of movies, offered a significant competitive alternative. The Antitrust Division noted that "movies are a unique form of entertainment. The experience of viewing a movie in a theatre is an inherently different experience from a live show, a sporting event, or viewing a TV or videotape of a movie in a home. ... Because going to the movies is a different experience from other forms of entertainment . . . a small but significant price increases for movie tickets generally does not cause a significant number of moviegoers to shift to other forms of entertainment to make the price increase unprofitable." Again there were numerous alternatives to actually going to the movies if one wanted to watch a full-featured film, including free TV and movie rentals, but these were not in the relevant product market because they were qualitatively different and these alternatives were unable to restrain the prices of, watching a film at a movie theatre.

Competitive Effects"
As the Committee is aware, antitrust merger analysis as currently conducted by the Federal Trade Commission and Department of Justice is not simply a matter of counting the number of competitors and calculating concentration. Rather, the agencies have taken upon themselves the obligation of identifying the likely competitive effects of a merger: how the merger will lead to higher prices, less innovation, less choice or less service. Let me begin with a simple observation -- if the market is appropriately defined as satellite radio this is a merger to monopoly - and there would seem to be the potential for significant anticompetitive effects. Obviously, in any market where a firm has a monopoly they have the ability to raise prices and reduce service, choice and innovation

because there are no other entities that could constrain such a change in price or service.

The parties have claimed that their ability to harm competition is minimal regardless of how the market is defined because of the availability of other alternatives such as terrestrial radio, iPods, Internet based radio and HD Radio. Of course, some probative evidence on the potential price constraining effects of these alternatives is likely to be found in the files of the merging parties. And perhaps the parties would like to share those documents with the Committee on a confidential basis. In terms af public documents, I found little to suggest that XM or Sirius responded in terms of price or product offerings with some of these alternatives. When one looks at the specific product offerings between and XM and Sirius we see them primarily responding to each other.

The Justice Department action against the DirecTVIEchostar merger in 2002 is instructive. In that case, the DOJ raised concerns that the merger of those two companies would reduce competition in terms of program prices, program packages, program variety, technology improvements, channel capacity, low equipment prices, installation prices, local channels and targeting each other customers, Of course, satellite television is different then satellite radio. But I believe that in many of these respects, competition between XM and Sirius will be lost because of the merger. Contrary to their public statements since the proposed merger was announced, the companies' track records makes it clear that each views the other as the primary source of competition. This direct competition has kept service prices low, increased the affordability and sophistjcation of satellite radjo receivers, lead to reduced receiver prices, and greatly expanded the-breadth -and variety of- program offerings; Will a monopoly provider of satellite radio continue this trend? History tells us no.

Let's just take for example the question of program variety. When XM comes up with a new form of entertainment channels such as Spanish language sports -- Sirius will carefully evaluate the need to respond to that new form of entertainment. Sirius likely will respond with something similar or another alternative which will attempt to differentiate their product from XM's product, for example, airing NFL games in Spanish.

Product variety, diversity, and choice is an important aspect of competition from the perspective of those who develop content. Imagine for a moment that you are interested in starting a radio channel of talk and news about pets. (After all there is a television channel focusing on pets). Now it is highly unlikely that the economics of terrestrial radio would support such a format, even with the added stations from HD Radio. And a web based format would not have that many listeners, nor is it portable like satellite radio. Currently, the provider of this content would have two satellite radio stations to pitch its content to. Perhaps one of them will take the risk and add the pet radio content in order to differentiate its product from the other. If the merger is approved, however, there will be only one firm dictating what can be found on satellite radio. There will be only one toll booth to the single highway to satellite radio and XMSirius will be the toll keeper. Without rivalry, diversity will suffer and the incentive to differentiate and innovate will be significantly dampened.

Before we leave the issue of competitive effects let me focus on one more important issue - can there be competitive concerns if the market is defined broadly to include other technological alternatives? The answer is yes. Antitrust law is clear that there may be competitive concerns from a merger in a broadly defined market where the merged entities are close rivals and the merged firm would be insufficiently constrained by others and could raise prices or reduce choice or service without fear of losing a sufficient number of customers to make such conduct unprofitable. This is called "unilateral effects." Unilateral effects analysis asks whether the merging parties are each other's closest competitors, and whether, post-merger, another firm could fill the lost competition that was created by the merger of the two parties.

Regardless of whether terrestrial radio, HD Radio, and iPods are part of the "relevant market," the antitrust laws ask whether the elimination of XM or Sirius will give the merged firm a greater ability to act unilaterally to raise prices, reduce service, choice or innovation. Practically, the answer must be "yes." Head to head competition between XM and Sirius is critical to the market. As the Sirius 10-K observes: "We compete vigorously with XM Radio for subscribers and in all other aspects of our business, including the pricing of our service and our radios, retail and automotive distribution arrangements, programming acquisitions and technology." None of the other audio entertainment alternatives, even if they were part of the same market could step in the shoes to replace the lost competition between XM and Sirius. None can offer unregulated content because of FCC regulations. None can aggregate demand and offer national radio programming opportunities to listen to Red Sox games as I discussed above. None offer a broad array of music and other premium content. None offer subscription services. In short, the merger will leave a gaping hole in the market, and the merged entity will be unconstrained in its ability to raise prices or reduce choice and service.

Entry

The parties appear to argue that new forms of technology will be able to effectively restrain their ability to increase prices post-merger. The Merger Guidelines suggest that entry may be a significant countervailing factor to constrain a price increase if that entry is likely, timely, and sufficient to forestall anticompetitive conduct. The time horizon for such entry, according to the Department of Justice and the courts, is two years. Of course, the parties are not suggesting that there can be new entry into satellite radio because of the regulated nature of the business.

Rather the parties focus on technological change. There certainly is significant technological change in broadcasting, including the development of high definition radio and digital media. However, even these nascent alternatives cannot provide the wide variety of products of XM and Sirius. It is probably several years until HD Radio is widely available in the market. Other alternatives, such as internet-based radio, may provide individual alternatives for individual product offerings but is not automobile based. None of these alternatives can perform all the essential functions of satellite radio -- aggregating demand, ubiquitous service, product variety, diverse formulated programming and unregulated content. Thus, it is unlikely they can enter within the 2-year period and effectively restrain prices. A promise of potential entry is insufficient to approve potential anticompetitive effects of the merger.

Efficiencies

The parties have suggested that there are significant efficiencies that may result from the merger. Certainly, as in any situation where there is strong rivalry between two firms, consolidating services may reduce cost. It is important for the Committee and for antitrust enforcers to recognize the limited circumstances in which efficiencies can justify an otherwise anticompetitive merger under the antitrust laws. Those efficiencies which are considered under the antitrust laws are solely those efficiencies which lead to improvements for consumers in terms of lower prices, greater innovation or greater service. Moreover, an efficiency must be merger specific - that is it can not be achieved in any less anticompetitive fashion. When a cost savings does not result in those benefits to consumers it is not properly considered.

Let me provide an example on merger specificity. The parties suggest that the merger will be procompetitive because it will permit a listener to enjoy the programs of both XM and Sirius. For example, they suggest that a listener will be able to listen to both Major League baseball and the National Football League or Martha Stewart and Oprah. Of course, the parties do not need a merger to share content - they already share some content. There is no reason why content must be exclusive.

There are two main reasons the parties' efficiency arguments should not justify the merger. First, the argument that it is efficient to eliminate programming overlaps ignores the competition between Sirius and XM to secure quality programming. Providers of programming are likely able to play Sirius and XM off against each other to secure favorable access to satellite radio. The antitrust laws are concerned with this competition as well. Second, it ignores the fact that many of these programming additions were brought about because of the arms race between Sirius and XM. For example, Spanish-language sports programming may never have come to satellite radio absent competition between the parties.

Moreover, efficiencies typically are considered only to the extent that the cost savings
will be passed on to consumers in lower prices and better service. I have a simple question: If XM-Sirius becomes a monopolist, why will it have any incentive to pass on these cost savings in benefits to consumers? We have only the parties' word that he will do so. Historically, that has been insufficient to satisfy the Clayton Act's standards.

The Promise of a Benevolent Monopolist
Finally, the merging parties suggest that they are willing to consider practically any type of regulatory decree to protect the interests of consumers. For example, they have suggested a promise of a certain level of service or promise a cap on price increases. Let me be clear about this: under the antitrust laws, regulation is not a substitute for competition. Competition is a vastly more effective way of allocating resources and assuring consumers receive the benefits of a competitive market place. Regulation, especially regulation based on a promise by a benevolent monopolist, cannot substitute for that competition. That is why in countless cases, courts have rejected promises by merging firms not to increase prices. In some instances, primarily local hospital mergers, some state antitrust enforcement officials and one court have permitted mergers based on promises not to increase prices. Ultimately, this has been a Faustian bargain which the communities in these markets have learned to regret. A monopoly is forever. After the period of quasi-regulation has expired, those communities have suffered lower service and higher prices.4 And the difficulty of regulating markets is one problem that the Department of Justice is ill-equipped to handle- the antitrust agencies do not have the capacity to act as centralized enforcers of market pricing. Indeed, such regulation runs directly contrary to our entire economic structure and the purpose of the antitrust laws. Moreover, the history of regulation of the cable TV industry - which has been plagued with consistent

price increases unrelated to costs -- shows that regulation is an extraordinary poor alternative to a competitive market.

And this promise not to raise prices should be irrelevant anyway. The merging firms
already have already discussed increasing prices, in the form of tiered pricing. Today, the merging parties promise that the post-merger price for all stations on XM and Sirius will be less than the cost of purchasing XM and Sirius separately, but in essence, they are saying that postmerger consumers will bear the cost of new programming, which runs contrary to the state of competition today. When XM took the NHL from Sirius did subscription prices increase for XM because of the new programming? No. When XM added Oprah Winfrey, did prices increase for XM services? No. When Sirius added NASCAR, did the price of a Sirius subscription increase? No. Why not? Because an increase in price may have led consumers to switch to the other satellite radio. But if the merger is permitted when new services are added, by combining best of-breed programming from Sirius and XM post-merger, consumers will bear the cost of the new services, because the merged entity will no longer face competition for new subscribers. Thus any promises about tiered pricing is no more than a promise no to increase prices “too-much”—but, rather, just enough to fuel the profits of the post-merger XM entity.

As a policy matter permitting a merger based on a promise not to increase prices is poor antitrust policy. As two former FTC enforcers stated: As a policy matter, antitrust enforcers and the courts have been reluctant to pennit anticompetitive mergers to occur based on the promise of the parties not to increase prices. . . . As the U.S. Supreme Court has pronounced, the antitrust laws rest "on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." N.C.A.A. v. Board of,Regents, 468 U.S. 85, 104 n.27 (1984). Courts have recognized that prices set by agreement are no substitute for competition. As explained by the Court in United States v. Trenton Potteries Co.: "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." 273 U.S. 392 (1927).

[A]ny agreement providing a price cap offers no protection against the elimination of non-price competition. "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain--quality, service, safety, and durability--and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." National Soc'y of Prof1 Eng'rs v. United States, 435 U.S. 679, 695 (1978). Permitting an anticompetitive merger to occur based on a promise not to increase prices would insulate the allocative decisions from the self-governing forces of competition and place them within the sole control of merged firm. Moreover, without the drive to compete, there is no certainty efficiency benefits would be passed on to consumer. That is why courts almost uniformly reject offers to cap prices in response to an anticompetitive merger. A good example of this was Judge Sporkin's decision in FTC v. Cardinal Health, in which the court enjoined two mergers of the four largest drug wholesalers in the market. The parties proposed a price cap and Judge Sporkin actually had the parties mediate whether a price cap would work. Ultimately the court rejected the defendants' promise as an antidote to anticompetitive effects, because resorting to a "price cap" would have effectively deprived consumers of the lower prices and improved service that would derive from competition: The Defendants' promise not to raise prices fails to ensure that prices will continue to fall after these mergers--or fall by the amount they would have absent the mergers. This Court is not convinced that the Defendants would still vigorously compete with one another after the mergers to continue lowering their prices. In the absence of real competition, it is concerned that the prices set today could in effect become the floor tomorrow.

Conclusion

In respects the promises of the merging parties remind me of a scene from Frank Capra's famous movie It's a Wonderful Life. At a critical moment, Mr. Potter, the owner of the dominant bank in Bedford Falls tries to get George Bailey, the owner of the only rival bank, to sell out to him. He points out that once they have merged, Mr. Bailey will be able to offer his family the type of comfort and stability that he will otherwise have to struggle for. Of course, we know from the movie what would have happened if George Bailey had accepted Mr. Potter's offer: the town would have become servant to Mr. Potter's bank as it became a monopolist and the town would have lost the benefits of competition that led to affordable housing, new small businesses and countless other benefits for consumers. I am not suggesting that the management of XM and Sirius have the nefarious desires of Mr. Potter; however, Mr. Capra teaches an important lessen for antitrust enforcers and this Committee: it is only competition that can guarantee consumers the full range of benefits in low prices, better services and greater choice. Nothing can replace competition. I appreciate the opportunity to testify and look forward to your questions.

1 My testimony represents my own views and not those of any clients. I do not represent any clients with any interests in the XM-Sirius merger.

2 Both the Sirius and XM websites explain how satellite radio is different from terrestrial radio. They do not address other supposed alternatives such as iPods, HD Radio, or web based radio. This suggests that the merging parties do not perceive these as significant alternative forms of competition.

3 My analysis solely focuses on the impact on consumers. However, there can be anticompetitive effects for others including content providers and advertisers. XM's Internet site actively solicits advertisers noting the value of its product offerings for advertisers.

4 David Balto and Meleah Geertsma, "Why Hospital 'Merger Antitrust Enforcement Remains Necessary: A Retrospective on the Butterworth Merger," 34 Journal of Health Law 129 (Spring 2001).

5"khard Parker and David Balto, "The Merger Wave: Trends in Merger Enforcement and Litigation" 55 Business Lawyer 35 1 (November 1999).

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PRINTABLE VERSION

**David Balto**

David Balto is an antitrust lawyer in Washington, D.C. and has practiced antitrust law for over 20 years in the Antitrust Division of the Department of Justice, the Federal Trade Commission and private practice. At the FTC he was the Assistant Director for Policy and Evaluation in the Bureau of Competition and attorney advisor to Chairman Robert Pitofsky. In these positions he was a senior advisor in all aspects of the FTC's merger and non-merger enforcement program. He helped litigate the challenges to the Staples/Office Depot, Drug Wholesalers, and Heinz/Beechnut mergers, and the Intel monopolization case. Mr. Balto helped guide many of the FTC's seminal pharmaceutical and healthcare enforcement efforts, identifying and helping litigate major cases such as the challenges to patent settlement agreements and other exclusionary conduct. He was an advisor in many of the FTC's pharmaceutical merger enforcement cases, including Glaxo/Smithkline, Merck/Medco, Lilly/PCS and Ciba/Sandoz. He was liaison on competition issues with the FDA and Congress and advised several Congressional committees on pharmaceutical competition and Hatch-Waxman reform.

Mr. Balto is a prolific author on antitrust, consumer protection, financials services, and health care competition. He is Vice-Chair of the ABA Antitrust Section's Federal Civil Enforcement committee.

Mr. Balto received his B.A. from the University of Minnesota, and his J.D. from Northeastern University School of Law.

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FORWARD THINKING AT THE NEXUS OF POLICY, MARKETS AND CHANGE

by Scott Cleland

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# XM-Sirius merger is anti-competitive: "The Emperor has No Clothes"

Submitted by Scott Cleland on Sat, 2007-03-31 16:46. Competition | Deregulation | FCC | Net Neutrality

As a fervent and principled advocate of free markets and competition, I have also been a long-time proponent of principle/precedent-driven anti-trust enforcement under the law. I truly believe that real competition is good and that real, legally-determined monopolization is bad.

- The **Washington Post article today: "XM-Sirius Debate Comes down to Competition"** goaded me to write.
- When Gigi Sohn, of Public Knowledge, one of the biggest supporters of net neutrality, becomes a strong advocate for this merger, as in the public interest if they price and content regulate it to the hilt, we are in la la land and not in the land of competition ad antitrust.

Any principled antitrust analysis of the XM-Sirius merger will find this merger quite quickly to be a "no-brainer" decision -- that it is anti-competitive and illegal under long time anti-trust precedent and competition policy.

- I believe the DOJ and the FCC will do a principle and precedent driven review of the XM-Sirius merger and will block it with great conviction.
- The Washington Post article and Gigi Sohn have fallen into the trap that everything is politics and everything is just spin and negotiations.
    - NO! There are such things as law, as legal precedent, as sound policy, as the public interest -- that often get pressured and abused, but generally not trashed.
    - **This may be the simplest, most straight-forward antitrust violation the DOJ and FCC have ever been confronted with. It's obvious!**
        - Just as the childrens fable had lots of the emperor's people oohing and ahing at the beauty of his new "non-existent" clothes, it took the boy in the background to speak up and say the "Emperor has no clothes!"

The XM-Sirius merger is so over-the-line that it is actually a monumental waste of valuable and

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scarce Federal resources. XM and Sirius can't be serious. They must be hoping that the Federal Government is comatose.

- If the DOJ and FCC endorse and enable an obvious government -created duopoly to become a monopoly, they would move the goal posts so far from existing precedent that they could not legally justify blocking almost any merger in the future.
- If the DOJ or FCC approved this obvious attempt of monopolization, it would be open season on Federal antitrust and competition policy.

Let me explain why the XM merger is such an obvious no-brainer that it will be and should be blocked.

First, cut through all the slick spin and attempted re-framing of competition and how XM and Sirius want it to be defined and not as decades of Federal anti-trust enforcement have defined competition. This not about what a poll thinks or a press article says. It is about hundred-year law that has decades of precedent determining what is legal and what is not based on LEGAL PRINCIPLE.

Second, this is a clear government-created market. XM and Sirius could not be in business without the a government license of spectrum to create a national subscription based satelite service market. The FCC at the time granted the licenses contingent on them not being combined. The FCC was implementing competition policy not monopoly price regulation.

- Spectrum is scarce and needs to be licensed to prevent chaos. Spectrum licensing is like traffic laws, without them there would be mayhem and no market.
- The FCC was created in the 1920's period of time to bring order to the chaos of everyones' transmissions interfering with each others. I am not a big fan of the FCC, but clearly believe they have an extremely valid governmental purpose in managing spectrum so that it can be a commercially viable resource.

Without spectrum, XM and Sirius are nothing. Nada. That spectrum grant alone makes satellite radio a separate and distinct market for antitrust purposes. It just isn't that complicated.

- Does Apple need spectrum to offer iPods?
- Who programs an iPod? It's user does.
  - Who programs XM and Sirius? Multi-billion dollar corporations with hundreds of millions of dollars to spend on "exclusive" programming.
  - Are they trying to say that an average consumer "programmer" is in the same league and market as XM and Sirius? That's a joke.

Third, well what about over the air radio broadcast?

- They are also licensed by the FCC and could not exist or do business without a government license to do so.
- The government organized the over the air radio market in another era under a completely different business model.
  - They got free local spectrum licenses, for an advertising model, and had public obligations of carrying public interest messages and not transmitting indecent programming.
  - Satellite radio licenses enable a national radio market, for a subscription-based model and they do not have the obligation to not transmit indecent programming.
- The government organized very different radio markets.
  - If organizing markets differently does not make them distinct markets from each other what would?

Let's cut to the chase here.

- XM-Sirius want the Government to approve a duopoly to a monopoly.
- While the Chicago school of antitrust, of which I subscribe to, believes it is still competitive to allow a market to go from 3 to 2 players in some very exceptional circumstances, I know of no serious antitrust expert that thinks allowing a duopoly become a monopoly is not substantially lessening competition. It would be oxymoronic and more simply moronic.

I am amazed that the press have not cut through the chatter and spin better on this.

- This is a slam dunk. A no-brainer to block.
- The DOJ and FCC can not and will not say this until they have collected and evaluated all the evidence.
- But when they do, it is a really easy decision. They will say NO.

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The New York Times

February 24, 2007
Editorial

# Tuning In to One Company

Vigorous competition in the private sector has served the United States economy and consumers extremely well, providing a greater array of choices, more innovation and lower prices. The two — and only — satellite radio companies are now eager to merge and are arguing that together, they will prove to be the exception to the rule.

The industry is important and still young. We urge regulators to take a hard look at the companies' proposal before leaving the field in the hands of a single player.

Sirius and XM provide subscription radio services for some 14 million customers, with each company beaming more than 100 channels of music and talk radio, much of it without commercials. The services — both less than six years old — have generated considerable excitement with things like high-profile and high-price deals, including the $725 million in cash and stock that the shock-jock Howard Stern is reported to have signed for.

Together the two services have also managed to accumulate $6 billion in losses since receiving their licenses a decade ago.

The companies' managers argue that the $13 billion merger could finally make them profitable by letting them cut costs and redundant programs, while giving consumers more programming options for their bucks. As for the fear of creating a monopoly, they argue that competition will still come from terrestrial radio (commonly known as AM and FM), iPods and other next-generation technologies.

It is important to remember that these are not widget makers. Radios carry important discourse and debate — they are vital to the free exchange of ideas protected by the First Amendment. Recent experience shows that media consolidation usually leads to more homogeneous content, politically as well as artistically, and it rarely benefits the consumer or the country.

There is also the question of what precedent would be set if regulators accepted the broadest possible definition of audio competition, and whether that could lead to even more mergers in radio. No less troubling are reports that the companies believe that they have an incentive to merge before the Bush administration and its overly friendly-to-business regulators leave office.

The companies should, of course, be allowed to argue their case. And consumers should voice their opinions as well. Unless they want to pay for both services, subscribers are currently missing out on exclusive shows: Mr. Stern can be heard only on Sirius, and the nation's empathizer in chief, Oprah Winfrey, only on XM. Sports fans who want football and baseball have to pay for both services.

Consumers should also recognize that XM and Sirius compete vigorously for customers, talent and corporate partners. Both even charge the same rate, $12.95 a month, a price that might well rise if there was no competition.

When XM's and Sirius's licenses were granted, the Federal Communications Commission stipulated that "one licensee will not be permitted to acquire control of the other." The chairman of the F.C.C., Kevin Martin, reiterated that point this week but left the door open to a possible merger, saying, "The companies would need to demonstrate that consumers would clearly be better off with both more choice and affordable prices." We are skeptical about the chances of that happening.

washingtonpost.com

# They Fuse, You Lose

By Rob Pegoraro
Thursday, February 22, 2007; D01

The XM and Sirius satellite radio services came into being to give listeners a creative alternative to the soul-numbing monotony of commercial FM. But a proposed merger announced this week comes right off the standard playlist of other merger-happy industries.

Like every other newly engaged corporate couple, XM and Sirius say they must unite to survive -- the "let us merge, or we'll all die!" argument. They also repeat the usual assurances that the post-merger market will be as competitive as ever -- since they were never real rivals anyway.

You've heard the exact same arguments made for most high-profile mergers. Whether it's banking, phone service, airline travel or gasoline, we're supposed to believe that reducing the number of competitors can only improve things.

More often, the only third parties to profit from a merger are the lawyers who usher the transaction to completion and the printing shops that crank out new business cards.

In the case of satellite radio, more is at stake than the number of channels beamed down from orbit. Competition pushed Washington-based XM and New York-based Sirius to come up with innovations in pricing (Sirius's $500 lifetime subscription fee) and products (XM's Mini-Tuner plug-in module, which lets you use one account with multiple receivers). A merger undercuts the need for further innovation.

The government, which sold XM and Sirius their radio licenses on the condition that they stay separate, will have a chance to veto this merger. But even if it stops the deal, we'll still be stuck with deeper issues that cramp our ability to buy the gadgets and services we want.

The biggest one is device choice, the way telecom providers limit which products can connect to their services. If you've been happy with your Dish Network set-top box but prefer the channel selection of DirecTV or Comcast, tough -- you'll have to give up the old box to make that switch. Instead of a company's customer, you may feel more like its property.

The history of XM and Sirius demonstrates this. Both firms once pledged to establish a common standard for receivers, which would have let subscribers keep the stereo they liked after changing services. But they quickly, conveniently, set aside this goal.



Each company's exclusive deals with car manufacturers provide a particularly strong form of lock-in. Buy a new Acura but want to listen to Sirius? You'll have to rip out the Acura-installed XM tuner and pop in one that works with Sirius.

A Sirius-XM merger would end that problem, but not before inflicting a final insult. At some point, either Sirius or XM subscribers -- or maybe both -- will have to junk their old radios to keep tuning in to the new company's broadcasts.

That's not to say that viable competition always leads to more choices for consumers. In the communications market, companies seem strangely reluctant to compete on price. Most would rather give you more for the same price than lower the monthly rate -- whether or not you have any time or ability to enjoy the extra service provided.

Cable and satellite providers, for example, throw more channels into their entry-level packages, Internet providers rev up download speeds, and cellphone carriers add more minutes. (Sirius and XM initially offered customers a choice -- a lower price with some ads, or a higher price with fewer ads -- but then settled on the same monthly rate in 2005.) Customers who use these services heavily can benefit, but everybody else winds up subsidizing those few.

There's not much government can do about this behavior but encourage more companies to contest a market. So why does it keep working in the opposite direction? At best, it ignores ways to open industries to more competition; at worst, it encourages further consolidation.

Consider the recent history of radio. Before satellite broadcasts could get off the ground, relaxed ownership rules allowed commercial FM to be largely taken over by Clear Channel and its monopoly-minded ilk, resulting in a nationwide radio dial of sound-alike stations.

Two other technologies, low-power FM and digital AM, could have restored some diversity to the public airwaves, but inaction or interference by the Federal Communications Commission and Congress has consigned both to irrelevance so far. And so for years, only satellite radio could offer an alternative to FM. (Lately, HD Radio has finally begun to open up FM programming.)

Now, XM and Sirius suggest that wireless broadband will keep them honest; customers turned off by both FM and satellite radio will be able to listen to music sent through their cellphones.

But most wireless carriers impose grotesque limits on what you can listen to or watch on a phone: Listening to a Web radio station on a phone's Internet connection violates most of their contracts. This isn't bringing the diversity of Internet radio to cellphones -- it's recreating the controlled universe of cable TV. And it's unlikely to offer much of a meaningful alternative to dissatisfied listeners.

It's too soon to know what the government will do with the XM-Sirius merger proposal. But by not addressing these underlying problems, Washington isn't just approving telecom monopolies, it's aiding and abetting them.

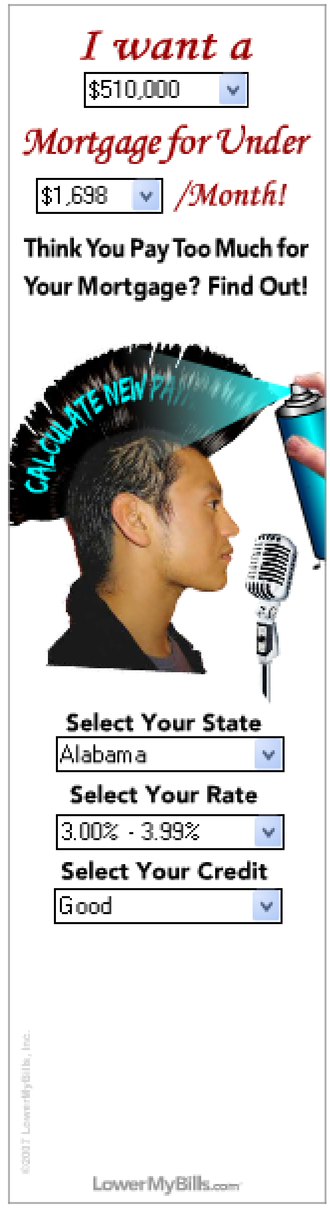
*Living with technology, or trying to? E-mail Rob Pegoraro at robp@washpost.com.*

washingtonpost.com

# Sirius-XM Merger Would Send Wrong Signal

By Steven Pearlstein
Friday, February 23, 2007; D01






Here's what to expect if the Justice Department and the Federal Communications Commission allow Sirius and XM to merge, creating a monopoly in the satellite radio business:

Clear Channel will start buying every radio station in America that it doesn't already own.

Apple will be able to buy any company that begins to challenge its dominance in the market for portable music players.

Comcast will begin merger talks with Time Warner Cable.

And there will be nothing standing in the way of a marriage of NBC and CBS.

All that will be possible because the government will have declared that there is so much competition between the different technologies in the market for digital material -- and the outcome of that competition is so uncertain -- that there is no reason to worry about consolidation of companies using the same technology.

This is the Powell Doctrine -- not the one about overwhelming force enunciated by Gen. Colin Powell when he was chairman of the Joint Chiefs of Staff, but the one promulgated by his son, Michael Powell, while he was chairman of the FCC. The younger Powell was guided by this doctrine in giving the green light to consolidation in almost every corner of the telecommunications sector. In the one instance he deviated from that position -- blocking the merger of EchoStar and DirecTV -- it was narrowly, on the ground that there weren't enough broadband competitors in many rural areas.

There is something to the idea that antitrust regulators should use a lighter touch, and exercise greater humility in predicting what might happen, during periods of rapid technological change. But even discounting for that, there are plenty of reasons for the government to block an XM-Sirius merger, which would create a monopoly.

Let's start with the obvious, which is that that while there are now multiple sources for digital music, they aren't perfect substitutes for each other.

I like radio, my wife will listen only to CDs, my daughter prefers her iPod, and my son will enjoy the convenience of getting music on his cellphone when that service finally takes off. Any of us could switch if the other channels offered lower prices or superior quality, but the differences would have to be pretty significant to overcome habit and personal preference.

Moreover, people are somewhat locked into their current choice by the investment they've made in equipment or contracts with companies. In that way, too, customers are "sticky."

The different technologies also have different business models, complicating the terms of competition. Old-fashioned radio makes its money from advertising, so it is hard to see how it could discipline the XM-Sirius monopoly for raising prices. Nor could Apple, which makes its money selling devices and downloaded songs. And we don't even know yet what the business models will be for Internet radio or music over cellphones.

In fact, XM and Sirius really offer two services. One is music programming. The other is the delivery of that programming via satellites and ground stations. Most of their customers buy the package, but not all. I get limited XM service as part of my DirecTV subscription, and in the future one can imagine cellphone operators and cable companies and maybe even old-fashioned radio stations contracting with XM or Sirius for programming. A merger would reduce their choice of suppliers.

In the same way, XM and Sirius are engaged in furious bidding wars to get different auto companies to install their systems as standard features and options. Obviously, that kind of competition will disappear after a merger -- in fact, the companies say explicitly that would be a benefit of the merger. At the same time, it works to the detriment of car buyers.

As for consumer choice, the companies argue that by eliminating duplicative folk channels and '80s rock channels, the merger will give them the money and bandwidth to launch even more specialty channels. Of course, we have no assurances of that. And as anyone with 500 channels of cable knows, there is a diminishing return to that kind of "variety." My hunch is that music lovers would be better off if XM and Sirius continued to compete by providing the best and most innovative jazz channels, for example, than offering me only one jazz channel along with another specializing in East European folk dances.

Moreover, you can bet your Gilbert Arenas game jersey that XM-Sirius would try to use its new clout and financial resources to outbid competitors for the exclusive audio rights to major sporting events, including those of your local teams.

XM and Sirius are correct when they argue that we are about to enjoy a competitive free-for-all among various companies and technologies to determine which is the most effective in bringing digital music to consumers. It is a process that will foster innovation and greatly benefit consumers. But for precisely that reason, this is the wrong time to give one technology a leg up in that competition by allowing it to become a monopoly, while other companies are forced to compete on two fronts -- against other companies using the same technology, and against companies using different technologies. By approving the XM-Sirius merger, the government would be stacking the deck in favor of satellite radio.

Moreover, history suggests that one or two of the technologies will eventually prevail by proving itself more effective and efficient. And if one of the survivors is satellite radio, consumers will find themselves worse off because the government had allowed a monopoly.

What we have here, folks, is a case of two money-losing companies locked in what has become ruinous competition, from which they hope to escape by merging. It may be that, given the economics of the business, there is room for only one to survive and prosper. But if satellite radio is such a "natural monopoly," consumers will be better off if the companies are forced to duke it out until one prevails and the other dies. The antitrust laws were designed to foster competition, not to foreclose it by bailing out competitors that overpaid for talent, over-invested in plant and equipment or over-promised results to their investors.

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