



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

**July 9, 2007**

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<b>In the Matter of</b>	)	
	)	
<b>XM Satellite Radio Holdings Inc.,</b>	)	
<i>Transferor</i>	)	
	)	
<b>and</b>	)	<b>MB Docket No. 07-57</b>
	)	
<b>Sirius Satellite Radio Inc.,</b>	)	
<i>Transferee</i>	)	
	)	
<b>Consolidated Application for Authority</b>	)	
<b>To Transfer Control of XM Radio Inc.</b>	)	
<b>and Sirius Satellite Radio Inc.</b>	)	
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**Comments of the Competitive Enterprise Institute**

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## Comments of the Competitive Enterprise Institute:<sup>1</sup>

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### Introduction: Antitrust Heightens Vulnerability to Political Predation

The Federal Communications Commission’s (FCC) recent hearings on media ownership, today’s debates over “net neutrality,” content regulation, a la carte programming pricing, and—the current instance—disputed mergers between communications firms like XM and Sirius signify that a heavy government role in determining the ownership structure of major media in the U.S. remains the default presumption. This should not be the case.

Satellite company mergers are one element of an evolving marketplace that increasingly magnifies consumer choice and ability to customize information; not merely information received, but also that which individuals themselves create or assemble for distribution to others. That personalization coexists with media enterprises that exist on a gigantic scale. Bureaucrats cause untold damage when they undermine network industries’ efforts to orient themselves, to attain the scale appropriate to fostering customization, and to achieve such feats as moving global information to the exosphere as satellite operations do. *Liberalizing spectrum for future satellite and communications operations—not restraining the private operations of those that now exist—should be FCC’s focus.*

The stakes are high for the communications industry at every level, from broadcasters to content providers to infrastructure providers. Controlling media structure facilitates regulating it across the board, whether through outright interventions or threats.

As CEI routinely emphasizes in regulatory agency filings, all parties stand to gain more from FCC rollback than from a re-legitimized regulatory regime. As in other frontier

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<sup>1</sup> The Competitive Enterprise Institute is a non-profit public policy organization committed to advancing the principles of free markets and limited government.

industry antitrust battles, this clash promises the greatest consumer bounty if regulators and opponents restrain interventionist impulses.

Worse, communications industry merger foes, like broadcasters, increase their own vulnerability to future political predation by resurrecting hackneyed smokestack-era antitrust arguments opposing this merger. Whatever genuine competitive threats broadcasters face from an energized XM-Sirius, that very broadcast industry—which faces a media ownership debate and even new threats of a “fairness doctrine”—will itself be rendered more vulnerable following successful restraint of XM-Sirius. Prospects of being let alone are better when healthy competitors flourish. Rather than calling the satellite industry a “separate market” in need of bureaucratic administration, all parties will ultimately profit from its being recognized as what it is—one of many ascendant competitive options populating media and entertainment.

If the FCC believes the technology marketplace cannot discipline itself and that micromanagement—even a forcibly mandated corporate non-integration (or withholding of permission, which amounts to the same)—qualify as sensible public policies, then no intervention is off-limits for any competitor. Meanwhile, regulators and competitors overseas notice how we treat our frontier industries, and emulate it—sometimes to the detriment of American business seeking to expand operations.

### **Opposing Viewpoints, Choice and Democracy Safer in a Media-Saturated World**

The XM-Sirius merger arises in a context in which many regard “big media” enterprises (curiously even in the distributed Internet age) as somehow threatening democracy, diversity and choice. But media companies—including those supplying “digital audio radio services” (shortened to DARS)—are conduits for information of every sort, and as private parties, they cannot monopolize it. Monopoly in information is impossible in a free society whose government does not practice censorship. Yet, the American Antitrust Institute, echoing FCC’s position at the time of licensing XM and Sirius, proclaims that a merger not only puts consumers at risk of losing station choices, but that “the diversity of *programming viewpoints*” is at stake if programmer (as opposed to consumer) access to a national satellite platform is reduced from two to one.<sup>2</sup>

The reality of aggressive competitor and programmer disciplinary responses to a merger like this will be addressed shortly, but we must dispense early with the notion that *market activities themselves* are the barrier to diversity of viewpoints. Precisely the opposite is true, yet this misperception colors the entire debate over media merger: Whether or not “intramodal” or “intermodal” competition exist, *without government censorship there is no fundamental scarcity of information*, nor can there be; more information can always be created, and particularly in our Internet-enabled age, nobody can silence anybody else. The most “big media” can do is refuse to share megaphones and soapboxes, figuratively

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<sup>2</sup> Comments of the American Antitrust Institute before the Federal Communications Commission In Opposition to Transfer Application, MB Docket No. 07-05. June 5, 2007. p. 14. (Emphasis in original.) [http://www.antitrustinstitute.org/archives/files/aai-%20XM-Serius%20letter%20to%20FCC%205-1-07\\_060520072048.pdf](http://www.antitrustinstitute.org/archives/files/aai-%20XM-Serius%20letter%20to%20FCC%205-1-07_060520072048.pdf).

speaking, which doesn't violate anyone's rights or threaten democracy, expression or "diversity of viewpoints."

The threat to viewpoints, diversity and choice is the accusation to trump all others; if it were true, it would be far more significant than the "mere" economic efficiency and welfare loss arguments that traditionally dominate merger debates. Ultimately, we must assess what is to be gained in preventing a merger, versus what is sacrificed in terms of consumer benefits from blockage; we must look at who wins from preventing a perfectly normal—and in a properly functioning market, one of many more to come—commercial transaction from moving forward.

### **Antitrust's Sherman and Clayton Foundations Occupy Shakier Ground Today**

Antitrust regulation allegedly polices monopolization and restraint of trade. But by elevating government intervention above the competitive discipline imposed by rivals, content providers, consumers and Wall Street investors, antitrust allows disgruntled firms to "collude" with authorities to mount costly (to the parties, the economy and consumers) legal attacks against rivals. That comfortable alliance fosters *selective perception* of monopoly power throughout the technology sector. Recently in the crosshairs: computer operating systems, business accounting software, databases, Internet routers, chips, online instant messaging, broadband services. Purveyors of all have been labeled "anti-competitive" domestically and abroad.

Perspective is warranted in a case like XM-Sirius: Total combined market capitalization reaches \$13 billion, compared to the nearly \$200 billion cumulative investment in the nation's wireless phone network (which increasingly offers music services that challenge satellite radio) or the—to pick one firm—\$57 billion market capitalization for Comcast Cable. Only some three percent of the public subscribe right now; the (approximately) 14 million subscribers that the XM-Sirius combination would serve seems hardly overwhelming compared with America's 113 million households, its 66 million cable subscribers, and an over-the-air broadcast infrastructure that reaches pretty much everybody. Yet critics imply that the *growth* from the single digits under the auspices of a single firm would be a bad thing. That's perplexing; "restraint of trade" is at issue, but there's sleight of hand stirring about who's engaged in such conduct—producers who want to produce, or those attempting to stop them.

In its practical impacts, antitrust regulation doesn't simply pick winners and losers; it artificially compels into existence an industry structure that otherwise would not have existed; it dictates entire business models by reorganizing industry parameters themselves. The distortions created by subjectivity in interpreting antitrust law, compounded by self-serving interpretations by competitors and agencies magnify when agencies get two bites at the apple as occurs when license transfers are involved. It's less that FCC need not resolve what consumers and the competitive environment are better suited for; it's that agencies are fundamentally incapable of such a task; particularly when their inquests are animated by rivals who would actually be disinclined to complain at all if they truly expected the merger to deliver a service consumers would reject. Indeed, as a

general antitrust reform measure, we support limiting the standing of competitors (as opposed to suppliers and downstream purchasers) in antitrust proceedings.<sup>3</sup>

### **The Illegitimacy of External Market Definition**

Opponents invoke the satellite market's "distinction" as cause to dismiss the merger. Narrow, unnecessary, and self-serving market definition by rivals threatened by a merger or other competitive business moves are common. Healthy, competitive distinctions become painted as illegitimate market advantages, while competitive alternatives available to the complainants, and entrepreneurial incentives others perceive in those very distinctions, remain downplayed or ignored.

Market definition hi-jinks have arguably worsened in recent years, in the sense that there's less excuse. Despite periodic modernization campaigns<sup>4</sup> smokestack-era antitrust thrives in non-technology sectors in what might be called the "Jarred Pickles" syndrome, which infects policy and undermines efforts to limit antitrust's extension into hyper-competitive technology sectors. Regulators halted the Heinz-Beechnut baby food merger to prevent pureed fruit and vegetable monopolization. The Philip Morris-Nabisco merger required selling off the "intense mints" business (Ice Breakers™). The Federal Trade Commission has even considered whether premium ice cream and jarred pickles are monopolizable markets. Since no internal sense of aversion to the preposterous automatically casts such cases aside or punishes those who file them, anyone who desires may arbitrarily specify a separate market in any realm.

Thus satellite's "merger-to-monopoly" is the ripest of targets; if one wants to find legal precedents to block it, that can be done. But that is not the same as an exercise in safeguarding consumer welfare.

Objections to the proposed merger are conventional: Combining the satellite radio marketplace's only two players would stifle competition. Here, the argument is that the merger would create a monopoly in "digital audio radio services," (again, DARS), and in the worst case threaten free speech or democratic (not the party) expression. Publicly, critics fear price increases (or, privately, decreases), loss of consumer choices and

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<sup>3</sup> On predatory pricing specifically, see, for example, Donald J. Boudreaux and Andrew N. Kleit "Cleaning Hands In Predation Cases: A Modest Proposal To Improve Predatory-Pricing Suits," *Competitive Enterprise Institute Issue Analysis*, October 1, 1996, <http://www.cei.org/gencon/025,01614.cfm>.

*From the Executive Summary:*

Rivals of price-cutting firms should be denied standing to sue for predation. The only private parties permitted to sue for predation should be firms that supply, and firms that buy from, price cutters....Every firm wants to be a monopolist in its own market, but also wants to buy from and sell to firms that are not monopolies. Consequently, while firms may have incentives to wrongfully accuse their rivals of predatory price cutting, no firm has an incentive to wrongfully accuse its customers or suppliers of predation....All that Congress needs to do is amend sections 4 and 16 of the Clayton Act to specify that rivals of price cutters have no standing to file suits alleging predatory behavior.

<sup>4</sup> The recent Antitrust Modernization Commission submitted its final report to Congress on April 2, 2007. The report is at [http://www.amc.gov/report\\_recommendation/toc.htm](http://www.amc.gov/report_recommendation/toc.htm).

programming diversity (or an increase in both). FCC Kevin Martin promised scrutiny, saying “The companies would need to demonstrate that consumers would clearly be better off with both more choice and affordable prices.”

Emphasis on a concept called “*intramodal* competition” characterizes this merger debate. That is, opponents liked having XM and Sirius compete, and want to keep it that way. In reality, network competition encompasses not merely movement from “A to B” on one wired or wireless network, or across one medium—but rivalry among platforms themselves. That is, *intermodal* competition is sufficient. And more: even without intramodal *or* intermodal rivalry, a constellation of pressures comes to bear on any network that abuses position.<sup>5</sup> Even monopoly’s “inefficiencies” merit tolerance in comparison with the realities of government failures and the likelihood that regulation locks in genuine inefficiencies. Administrative mistakes can be more difficult to rebound from than mere market misjudgments, upon which pitiless competitors pounce. Regulatory interventions like that being sought in the case of this merger often dampen the requirement for competitive responses; consumers suffer—but it’s unseen. They’re denied the “creative destruction” that the next phase of entrepreneurship could otherwise bring. (For example, satellite radio is valuable to rural areas because they’re frequently underserved by over-the-air broadcasters, according to Niel Ritchie of the Minneapolis-based League of Rural Voters.<sup>6</sup> Broadcasters benefit if relieved of the need to react to a strengthened satellite industry.)

Notably, the lack of additional intramodal DARS competition is not independent of prior government policies, and whatever market deficiencies have resulted are not resolved by government’s blocking this merger. The failure to drastically liberalize spectrum policy is the elephant in the room. In another example, Gregory Sidak invokes distinct markets in subscriber and non-subscriber radio created by FCC’s indecency regulations.<sup>7</sup> In a sense, it’s probably not legitimate to call something a *market* segment when the current structure was created either legislatively or largely driven by prior regulation; or created arbitrarily, as in awarding the original satellite licenses to two rather than merely one entity in the first place, as could conceivably have been done to no ill effect. (Or to three or four entities; what matters is fluid secondary markets in spectrum and bandwidth, a more worthwhile focus for the FCC.)

Antitrust lawyer David Balto provides a good summation of arguments that satellite markets are legitimately “distinct” (in trustbuster parlance, not necessarily in the normal

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<sup>5</sup> Some are discussed in Adam Thierer and Wayne Crews, *What’s Yours Is Mine: Open Access and the Rise of Infrastructure Socialism*. Cato Institute: Washington, D.C., 2003.

<sup>6</sup> <http://www.latimes.com/news/opinion/la-oew-healey25jun25,0,4170271.story?coll=la-opinion-center>.

<sup>7</sup> Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc. March 16, 2007. Copy stored at [http://www.xmsiriusmonopoly.org/images/sidak\\_study.pdf](http://www.xmsiriusmonopoly.org/images/sidak_study.pdf).

sense of the term) from other audio offerings. In testimony before the Senate Judiciary Antitrust Subcommittee, he notes that satellite service:<sup>8</sup>

- Is fully commercial free
- Aggregates demand for products that could not otherwise exist in a locality, but make sense offered nationally (his example is nationwide broadcast of a Red Sox game to D.C. listeners)
- Is capable of following users everywhere they go
- Offers far greater variety than even that available otherwise in major metro areas
- Provides diversity and introduces listeners to new content
- Offers content unregulated by FCC content strictures

But satellite is a response to the very lack of these features in conventional services—and now the perverse claim is that its expansion by a streamlined entity must be restricted to benefit consumers. Apart from the alleged failure of traditional broadcasters to offer variety, diversity and novelty being undeniably the fault of conventional broadcasters themselves, objection to each of these arise:

- Satellite is commercial free, but broadcast is subscription-fee free
- Local Red Sox games do not make satellite radio particularly unique or necessarily even attractive when interactive Internet radio (and podcasts and Webcasts, for that matter) increasingly makes far more advanced versions of local broadcasts possible. On Nascar.com, one can listen in on *individual drivers*,<sup>9</sup> not merely the race itself; that's not an option with satellite's current configuration
- As for content restraints, broadcast should be teaming with satellite for greater freedom; meanwhile, satellite itself faces threats that its content will be regulated as well.

Some opponents have called permitting a merger a “bailout” for XM and Sirius, which have been losing money. But since government should not be dictating competitive markets industry structure in the first place, forcibly keeping apart entities that seek to streamline would instead constitute corporate welfare for over-the-air and online broadcasters, who would get a reprieve from having to deal with a stronger competitor (an FCC-granted license to idleness that harms consumers). The broadcast industry, which itself has and will seek consolidation (and we have supported those ventures as well<sup>10</sup>), would best moderate such remarks.

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<sup>8</sup> 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.

[http://judiciary.senate.gov/print\\_testimony.cfm?id=2601&wit\\_id=6190](http://judiciary.senate.gov/print_testimony.cfm?id=2601&wit_id=6190).

<sup>9</sup> Nascar TrackPass offers “LIVE in-car audio for all 43 drivers!” for a fee.

<http://www.nascar.com/trackpass/>.

<sup>10</sup> See Wayne Crews, “Media Ownership Rules vs. Separating Speech and State: Which Serves Consumers, and What Should FCC Do?” *CEI c:\spin*, April 30, 2007. <http://www.cei.org/gencon/016,05919.cfm>.

In reality people can substitute among many options available in cars, homes and portable devices like mobile phones and iPods. Some services are beamed without user input; others are user programmed. All services operate somewhere along the market vectors of (1) broadcasting or narrow-casting and (2) of being provider-programmed or user programmed. The combinations available in the market continuum are infinite, and regulators wield no special information about the proper points to occupy. The fact that consumers can increasingly use the resulting audio (and increasingly video) services interchangeably thanks to mounting competitive pressures, along with consumers' ability to switch easily if they choose, matter more than conjuring artificial distinctions based upon the source, particularly when the complaining parties' own business models are transitioning unknown directions along both these vectors. It's quite unlikely that competitors are prepared to swear off extending their business models along these vectors as they become more capable of matching satellite feature-for-feature. Since they won't swear off their own competitive advantages, it's illegitimate to ask FCC to impose disadvantages on a satellite.

"Relevant market" assessment should not be performed at all; since it is, it must at least recognize close substitutes in terms of what consumers experience, not the particular medium; It must also recognize that a combined XM-Sirius cannot prevent defection. As a *Los Angeles Times* editorial summed it, "The goal should be to promote choice not in the niche occupied by XM and Sirius, but in the general market of audio entertainment."<sup>11</sup> One caveat: regulators can't "promote" choice apart from keeping out of the way of those actually doing things.

And that choice is burgeoning. NAB's president recognized the existence and strength of substitutes that are presumably enough to threaten his own industry (but presumably not satellite). Quoted in a *Wall Street Journal* editorial, he said: "On the radio side, we have satellite radio, Internet radio, iPods, other mp3 players, cell phones, and many, many other things. How will we compete?"<sup>12</sup> The idea that the same services that threaten the far larger broadcast industry cannot also discipline satellite doesn't hold together well.

Additionally, even without tomorrow's inevitable competing satellite ventures, competitors threaten: along with broadcast radio itself and the items specifically mentioned by NAB in the preceding paragraph we have digital radio, music-only upper-tier cable channels and cellphone company advances into the portable radio/music market. In terms of numbers, some 90 million loaded mp3 players are in use, while 65 million enjoy streaming Internet radio.<sup>13</sup> As the rivals to satellite radio incorporate video programming, say, for information services or videos to accompany the song one hears, they become even more attractive by comparison.

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<sup>11</sup> "Let XM and Sirius Merge," *Los Angeles Times*, February 20, 2007. <http://www.latimes.com/news/opinion/editorials/la-ed-radio20feb20,0,1739880.story?coll=la-news-comment-editorials>.

<sup>12</sup> Cited in "What's the Frequency, NAB?" *Wall Street Journal*, April 21, 2007. p. A8 [http://online.wsj.com/article\\_email/SB117712130983777658-lMyQjAxMDE3NzI3MzEyMjMxWj.html](http://online.wsj.com/article_email/SB117712130983777658-lMyQjAxMDE3NzI3MzEyMjMxWj.html)

<sup>13</sup> "A Monopoly—Not," *San Francisco Chronicle*, February 26, 2007, p. B4. <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/02/26/EDGRCOA5CM1.DTL>.



HD Radio, which requires new receivers, faces hurdles but is “making inroads into the new car market,” according to a *Washington Post* article citing research noting the 200,000 receivers sold in 2006 will reach a projected 1.5 million in 2007.<sup>14</sup>

Among the many who do strike a cautious tone in this debate, Gigi Sohn of Public Knowledge points out the many ways in which the various products do differ, but notes that “a product needn’t be identical to be substitutable.”<sup>15</sup> She does favor some restrictions on the merged entity with which we would disagree (addressed below), but this observation is the heart of the matter.

The “jarred pickle” syndrome invites a cynical view: There are only two ways the satellite market can realistically be considered “distinct” from this broader audio cornucopia to which consumers can so easily defect; either the entertainment and news services are not audio, or people perceive satellite radio with something besides their ears. There are no clear winners in this high-stakes battle, but government intervention would tilt the playing field, would make consumer defections likely to be away from satellite audio rather than toward it. The market definition game does illustrate the arbitrariness of antitrust regulation, the willingness to use government to manipulate consumer options via incentives that have nothing to do with marketplace realities. As we stress, there’s enough potential retaliatory mischief to go around: Why not a predatory-pricing suit from XM and Sirius against HD Radio for offering free radio as they struggle to establish for-pay services (particularly upon announcement of some future merger)? It’s unfair, after all. Or a suit based on the fact that NAB reaches the entire public at no cost while satellite reaches less than four percent.

### **Satellite Radio Disadvantages**

Whatever “distinct” features give the current configuration of the satellite industry transitory advantages, satellite’s *disadvantages* relative to today’s competitive options must be noted in fair debate. No one wields the omniscience that would warrant pre-judging the relative advantages of either side, and locking in their conclusions allegedly on behalf of consumers. The XM-Sirius capability to generalize or aggregate broadcaster-selected content for a national market may be less important than increasing personalization offered by interactive Internet radio that can reach the same national market—and appears on the verge of becoming mobile itself.

Satellite radio is irretrievably non-interactive, stuck in the old model whereby a programmer chooses for you; trends and customer preferences are instead toward user programming and finer choices than even satellite can offer. The reality is that some

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<sup>14</sup> Sam Diaz , “HD Radio Grabs the Ear of Satellite Rivals: As Listeners Discover High Definition, XM and Sirius Face Growing Competition,” *Washington Post*, July 3, 2007. p. D4.

<sup>15</sup> Testimony of Gigi B. Sohn, President, Public Knowledge, Before the U.S. Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. Hearing On: “The XM-Sirius Merger: Monopoly or Competition from New Technologies,” Washington, DC, March 20, 2007. p. 6. <http://judiciary.senate.gov/pdf/3-20-07GigiSohntestimony.pdf>.

competing offerings like Internet radio and increasingly capable mp3 players could conceivably trump the XM-Sirius business model altogether.

As for digital radio, XM-Sirius would charge subscription fees: Satellite HD radio will be no-fee. Since both target the new car market, it's not clear satellite can survive whether they merge or not. And as noted, longer term, XM-Sirius are hampered by not offering video services.

The disadvantages are brushed aside, rarely invoked. But FCC should step aside, and recognize the rights of producers to experiment with business models rather than overrule those rights and damage consumer welfare in the bargain. That experimentation is the only way to rise to the next level of competitive offerings.

### **Competitive Market Alternatives Transcend Obvious Substitutes**

Externally defining markets when those markets are borderless and subject to daily business-plan upheaval is misguided conceptually and an invalid exercise; Properly, in a free-enterprise, capitalist economy, it is a conceit that never surfaces. Markets are merely the sums of innumerable voluntary activities; Third party non-participants pronounce no such priestly judgments from this or that external perch.

It's true that services offered by DARS and alternatives are different in the proper, positive sense of the term, rather than distinct in the hairsplitting, legalistic trustbuster parlance. Those differences are positive features to foster, not invitations or excuses to tamper. Perceived differences among products and the potential wealth creation that those differences make apparent are the essence of many business innovations, mergers (and competitive responses to mergers) included. And when they succeed economically, every business innovation forces competitive responses, inducing all to adopt the best service features of the others, even shift business models. Any regulation that relieves competitors of critical market impulses, of the need to respond to a superior service, hurts the interests of consumers. There is little acknowledgement of such political/bureaucratic failure, but the prospects for the competitive alternatives on the horizon are damaged by the destruction of wealth entailed in halting a productive merger.

Proceedings such as this make it obligatory to “defensively” point out alternatives to satellite radio like those noted in the previous section, and to argue that the opponents' claimed “distinctions” are not illustrative. But these pleadings to being left alone are not the crux of the argument. A fluctuating, competitive landscape means even the potential rivalry we now see understates the potential for competition.

Cell phone networks increasingly offer music services, and the new iPhone raises the bar for all the existing manufacturers. Handset manufacturers are being forced to open up new music—and video—services to consumers. A handset that permits radio but that also offers up every YouTube video will be appealing—but it's not clear that it's being recognized as competitive alternative to XM-Sirius. Again, XM-Sirius could be increasingly hampered by not being video and Web services.

Numerous transformations warn against priestly regulatory pronouncements; here are just a few:

- The form of content itself will partly drive the future competitive landscape, notably the struggle between centrally broadcast and user created content. The peer-to-peer revolution making broadcasters out of everyone will intensify, benefiting some business models, harming others
- Grim sales in pop music are bound to affect the entire landscape for audio entertainment. No one knows who will emerge least scathed
- Emphasizing listening alternatives to satellite radio ignores other competitive responses; from investors, from programmers, the likelihood of future mergers, the prospect of future satellite ventures that might be pursued if the merger succeeds (or abandoned if it fails)
- Changes in copyright law for content created in the future could mean even more individuals could set up their own radio stations
- Meanwhile, wide area networks in combination with Internet radio herald a new landscape. Dozens of regional wireless networks will increasingly facilitate *mobile* Internet radio that competes with satellite

### **Orbiting Around the Real Issue: Competing Satellite Platforms**

Apart from the competitive discipline provided by oft-noted alternatives, and inevitable changes in the competitive landscape, the rhetoric almost implies that XM and Sirius maintain an impenetrable Star Wars-like fleet of satellites. In reality, they operate six satellites. The entire commercial payload launch industry is a “mere” \$3 billion business (and most of that is government launches),<sup>16</sup> not big in a \$13 trillion economy.

Of factors limiting the founding of alternative satellite platforms, spectrum policy is the elephant in the room. The American Antitrust Institute commented that “Congress allotted half the spectrum planned for DARS to other uses”<sup>17</sup> so two companies rather than the initially planned four were established back in 1997. The population of competitors could change, however; spectrum now slated for other uses could be reallocated to DARS. Other companies own spectrum, and could re-deploy from existing services like cellular to satellite DARS if the economic calculus worked out, or if changes in the competitive environment (such as the current merger proceeding or some unanticipated future one by other players) altered the industry calculus. The very entities now balking at the prospect of this merger could instead be seeking partnerships to advance such ventures, or participating in some other way such as investing in terrestrial repeaters that bolster the satellite signals. FCC and congressional facilitation of bids on existing, underutilized spectrum (terrestrial and satellite) as well as ensuring fluid secondary re-allocation markets can advance matters.

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<sup>16</sup> *State of the Satellite Industry Report*, Satellite Industry Association, June 2006.  
<http://www.sia.org/PDF/2006SIAStateofSatelliteIndustryPres.pdf>

<sup>17</sup> AAI, pp. 5-6.

The following quote from *IEEE Spectrum* was not issued in support of the merger, but helps lend perspective, illustrating that FCC's hands are more than full in examining its own impediments to a flowering of services.<sup>18</sup>

Radio waves do not pass through some ethereal medium called “spectrum”; they are the medium. What’s licensed by governments is not a piece of a finite pie but simply the right to deploy transmitters and receivers that operate in particular ways.

Moreover, interference is not some inherent property of spectrum. It’s a property of devices. A better receiver will pick up a transmission where an earlier one heard only static. Whether a new radio system “interferes” with existing ones is entirely dependent on the equipment involved. Consequently, the extent to which there appears to be a spectrum shortage largely depends not on how many frequencies are available but on the technologies that can be deployed. Many regulations intended to promote harmony of the airwaves have instead, by putting artificial limits on technology, created massive inefficiency in spectrum utilization.

FCC needs to get good at this; secondary markets for transferring spectrum and licensing are essential to tomorrow’s communications sector. Policymakers should direct attention there instead and assure more spectrum is made available; and that alienability of those rights is recognized—that they easily be sold off or apportioned for other uses without extensive bureaucratic involvement.

Current and future business ventures should not be restricted because spectrum policy reform remains incomplete. *Mandated* intramodal competition—a refusal to allow merger—is a destructive idea and harmful to consumers; nor is there any need to consider such, given the voluntary potential in properly liberalized spectrum. Leaving competition to competitors would allow policymakers to focus on that more worthwhile target, as well as enhancing the efficiency of *global* regulatory bodies that assign orbital slots. Policymakers seeking greater broadcast competition would best enable new companies to launch more satellites into space—not tinker with the business plans of the ones now venturing forth.

### **Antitrust Law “Barriers to Exit” Impede Needed Retrenchment**

Sometimes, competitive industries (much like individual firms, or individual people) overshoot and need to retreat and consolidate. In that sense, this merger might more properly be understood as a retrenchment than a grab for power (particularly when one firm could have been created in the first place). XM and Sirius have faced financial troubles, hemorrhaging after trying to out-compete one another and paying for high-dollar talent like Oprah and Howard Stern. Combined losses exceed \$7 billion. As columnist Steve Chapman put it: “As it happens, the alternative to one satellite radio

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<sup>18</sup> Gregory Staple and Kevin Werbach, “The End of Spectrum Scarcity,” *IEEE Spectrum Online*. <http://www.spectrum.ieee.org/apr04/3811>.

company may not be two companies but none.”<sup>19</sup> One suspects competitors seeking to halt the merger hope this is true.

Antitrust policy often ignores need to retrench. As in realities faced in individual lives and mainstream economic activity, retrenchment is sometimes urgent. This is not a new notion; Economist Joseph Schumpeter, in *Monopolistic Practices*, referred to antitrust policy’s risks, the potential for abuse by self-interested parties that would “limit the flexibility of industry to organize its own ‘advances’ and ‘retreats,’” as Competitive Enterprise Institute president Fred Smith summarized it.<sup>20</sup>

There more there is at stake, the more antitrust delays needed realignments; but this “Roach Motel,” you-can-get-in-but-you-can’t-get-out mindset could seriously damage, not just XM-Sirius, but the advantages consumers will gain from competitive responses from everyone else. Keeping XM-Sirius poor with duplicative costs and services means they have less ability to hire the right new high-dollar talent or make the right investments in R&D, advantaging rivals.

Relatedly, the attacks by rivals who claim the merged entity will raise rates can injure consumers. As Fred Smith noted:<sup>21</sup>

[A]ntitrust authorities ... tend to view all price reductions as good and all price increases as bad. Many problems are created by this situation, not the least of which is that firms may be loathe to lower rates, fearing that they will be prevented from raising them if it later proves necessary.

Price increases can often be beneficial to consumers’ interests when re-constituted services offer a better deal (always subject to discipline by competitors); but where cuts are warranted, as they likely will be in this case, antitrust’s bias against retrenchment may make firms reluctant to lower price when they otherwise would have, because future increases (retrenchments} would be attacked. The lower prices the merger could bring may be dampened by the frenzy created by the hostile antitrust climate itself.

The American Antitrust Institute wants to keep XM and Sirius apart, saying that duplication is a worthwhile cost to pay to maintain intramodal competition.<sup>22</sup> But duplicative infrastructure and needless programming overlap is not the casual cost and minor inconvenience that this group implies. Indeed, the true requirements of competitive markets are poles apart from this perspective. Producers serving the consumer interest do

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<sup>19</sup> Steve Chapman, "In a World of Options for Consumers, Fear of Mergers is Misplaced," *Baltimore Sun*, June 26, 2007. <http://www.baltimoresun.com/news/opinion/oped/bal-op.chapman26jun26,0,7247190.story?coll=bal-oped-headlines>

<sup>20</sup> Fred L. Smith Jr., *The Case For Repealing the Antitrust Regulations*, p. 30. <http://www.cei.org/pdf/3261.pdf>. Speech based upon “The Case For Reforming the Antitrust Regulations (If Repeal Is Not an Option),” *Harvard Journal of Law and Public Policy*, Vol. 23, No. 1, Fall 1999. pp. 23-58.

<sup>21</sup> Fred L. Smith Jr., *The Case For Repealing the Antitrust Regulations*, pp. 31-32.

<sup>22</sup> AAI, p. 2.

not waste time meeting a “heavy burden of demonstrating... public interest”<sup>23</sup> or anything else to priestly overseers as AAI demands; they structure their industries, conduct business and pay the price for mistakes, and the world moves on. If they can’t perform these entrepreneurial functions, neither will others, and wealth creating is diminished. As economist and “Knowledge Problem” blogger Michael Giberson noted, “Doesn’t the FCC know that by raising barriers to exit, they create barriers to entry for some future satellite radio rival?”<sup>24</sup>

This isn’t the first time regulators hobbled a nascent satellite venture. The FCC scuttled the proposed DirecTV/Echostar merger in 2002, a venture that (still) could increase consumer options, remove duplication, and shave costs. Competing against established land-based video and audio telecommunications is tough, requiring vast resources and guts; regulators make it tougher.

If the XM-Sirius combination fails as a business venture, the companies can divide again; or failure of the deal could facilitate a buyout of all or part of the entity by a better-positioned rival. The real irony would be if, thanks to FCC, rival and “consumer group” opposition, either XM or Sirius—or both—were to be absorbed by one of the incumbents against which they now compete, or that even now protest this merger. Policy could hardly get more perverse.

### **Imposed Concessions or Conditions Are a Fundamental Error**

The companies will likely relent to conditions imposed on the merger if approved. Regulators should absolutely refrain from using the merger review process to extract a parade of concessions. At the same time, antitrust policy *should* allow aggressive competitive responses to the combination. Wall Street, investors, programmers, consumers, already-poised rivals, and new entrants collectively will discipline the behavior of the combined entity more thoroughly than could the FCC. Media is a *business*, with upstream and downstream threats and pressures—disgruntled customers, programmers, authors, artists, advertisers, Wall Street analysts and the possibility of less-than-cordial takeovers. Any media enterprise that attempts to monopolize faces their collective wrath; there’s no necessary FCC policing role, and no need for “conditions” which merely put a veneer of authority on an anachronistic oversight process and keep regulators engaged.

Concessions are particularly offensive because they forbid a company from offering a product or service to customers that would otherwise be available to them—all to protect a competitor. Recall that the antitrust laws were to prohibit restraint of trade; concessions directly restrain trade.

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<sup>23</sup> *Ibid.*

<sup>24</sup> Michael Giberson, “Satellite Radio Merger: Antitrust Law in All Its Splendor to be Revealed,” *Knowledge Problem* weblog, February 20, 2007.  
<http://www.knowledgeproblem.com/archives/001931.html>Pres.pdf.

Price/rate freezes, mandated a la carte pricing, prohibitions on offerings of local services like weather, traffic and down-home news—all are inappropriate and harmful.

Consider local programming: Sometimes, the “demise” of “localism”—one of the alleged concerns—may not be inherently bad. Local news can be lousy and stilted and prejudiced. Regardless, the existence of *USA Today* doesn’t contradict or threaten the church bulletin—or podcast or Webcast. Moreover, such prohibitions would conflict with the earlier observation that nationally dispersed listeners with a tie to a distant locality cannot hear some specialized local content *unless* a satellite company aggregates it.

Given broadcasters’ own efforts to consolidate, a successful restriction on XM-Sirius capability to offer local programming will reverberate. And the idea of actually banning a local competitor seems preposterous: As Gigi Sohn of Public Knowledge noted, “[T]here is no reason why, in 2007, *any* media service should have a government-granted monopoly over local programming.”<sup>25</sup>

The best approach for broadcasters is to use the XM-Sirius merger as an opportunity for and foundation of a broader campaign separating speech and state entirely.

Conditions institutionalize the idea that government coercion is superior to and can replace competitive market discipline. Price increases, if they happen, create new tiers of economic activity that competitors rush to fill and ultimately bring prices back in line. Prices embody information; they are market signals upon which voluntary, free enterprise depends: concessions that impede price signals harm consumers, period. They can potentially cost decades in lost productivity and market evolution.

In its comments condemning the “public benefits” of the merged companies’ promise to offer integrated service packages at varied pricing packages, the American Antitrust Institute spoke approvingly of the earlier FCC *mandate* for interoperability of the receivers sold by the separate companies<sup>26</sup>—as if such a command model were an advisable way of structuring enterprise servicing consumers. Such comments illustrate how merger opponents and proponents operate from very different, irreconcilable conceptual frameworks in terms of understanding of what consumer benefits depend upon: The AAI approves of a coerced public benefit—but condemns a market process that would allow the firms to provide that benefit voluntarily.

### **FCC Proceedings’ Proper Focus**

To varying degrees, all merger proponents detail the competition that already exists, but even more useful in frontier industries like satellite is to step back and focus on the broader issue of improving the “racetrack” (the constricting regulatory environment) rather than tinkering with the cars that zip around the track. Antitrust proceedings tend to slow down particular cars, rather than ensure an environment in which all can run faster. Improving the track means reexamining the agencies’ own policies that impede progress.

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<sup>25</sup> Gigi Sohn, p. 3.

<sup>26</sup> AAI, pp. 10-11.

The bias should be toward liberalizing communications, not restricting struggling new venues.

Emphasis on liberalizing/improving the allocation for orbital slots and streamlining licensing processes and freeing spectrum has been noted. A liberalization agenda might also include working with other agencies or Congress to:

- Liberalizing research and investment in the satellite industry more generally
- Itemize bureaucratic barriers to entry, and remedy them
- Examine the copyright market with an eye toward flourishing of future content. This would include insuring that the ability to record digital broadcasts—whether satellite or HD radio or otherwise—is not lost.<sup>27</sup>
- Stop the attacks on differential pricing, a problem affecting many industries, lately the music-download industry.<sup>28</sup>
- Remove duplicative merger review.

FCC gets this bite at the XM-Sirius apple due to the license transfer, but this merger has been given the nod by The U.S. Department of Justice and numerous states. Some foreign governments have approved the deal; indeed, the real battleground over the telecom and Internet landscape is international—yet another reason why it's crucial that our domestic deals go through to create a solid competitive posture against overseas rivals. Indeed, starting from scratch today, we wouldn't create an FCC quite like the one we have; we'd make sure everybody's able to move around a racetrack without artificial, bureaucratic speed-bumps.

## Conclusion

One must always question who would benefit from regulatory interventions. FCC intervention in XM-Sirius would relieve competitors from having to respond with a similar scale effort. FCC intervention would cause a reduction in healthy competitive platforms; deny consumers the benefits they would otherwise enjoy from jostled competitors' competitive responses; and injure free speech in the broader media realm by making future mergers suspect.

Media ownership rules—in the specific case of XM-Sirius and in the broader communications industry—harm consumers and speech. It will take vast resources to build both the broadband networks of tomorrow and to create the increasingly narrow-casted, interactive content that consumers are demanding. Mergers and cross-ownership freedom, perhaps on a vastly unprecedented scale unthinkable today, will likely be part of the market processes necessary to take communications services to new heights.

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<sup>27</sup> See Wayne Crews, "Statement on the 'Audio Flag' Provisions of the 'Communications, Consumers' Choice, and Broadband Deployment Act,'" Competitive Enterprise Institute Media Advisory, June 22, 2006. <http://www.cei.org/gencon/003,05399.cfm>.

<sup>28</sup> Mary Jacoby, "EU Music Complaint Focuses on Record Firms," Wall Street Journal, April 4, 2007. p. B5. [http://online.wsj.com/article\\_print/SB117564508080059034.html](http://online.wsj.com/article_print/SB117564508080059034.html)  
Re-examine international agreements on orbital slots.



We ought not petition the FCC to tighten its regulatory grip, but rather phase out that agency's involvement in price, entry and ownership regulation in frontier technologies altogether. FCC's commissioners should be leading that charge in today's cornucopia-like communications environment; that they're not is discouraging. Intervention—whether blockages or conditions imposed on deals—means we're being treated to more turf preservation rather than the needed shifting toward the marketplace's own aggressive discipline of communications. Antitrust distracts us, postponing the day we address government's own policies that artificially restrict bandwidth and spectrum.

Competition, properly understood, has little to do with the number of competitors and industry concentration ratios that bewitch government commissions. It is properly understood as an extension of the same “voluntarism” that characterizes a free society that enshrines property and the right of contract, from social to commercial settings. Markets are the sum of competition and voluntary and tacit agreements between firms; Suppliers, business customers, and consumers have ample incentive to monitor and discipline abusive practices without antitrust, which itself is regarded as immune from the need for discipline. Yet unlike voluntarism, antitrust entails confiscation, restraint, and forced aid of competitors.

Antitrust activism will hobble tomorrow's technology and communications sectors, painting a bulls-eye on the back of competitors that rise above the fray or engage in large-scale transactions. The very complaints lodged against XM-Sirius now can, are, and will be easily lodged—inappropriately—against competitors' offerings. Too often, antitrust often doesn't create or assure competitive outcomes; it prevents them. That makes it an anticompetitive special-interest luxury we cannot—and never could—afford. The rise of global competitors makes reform more urgent.

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