

**THE XM-SIRIUS MERGER: MONOPOLY OR
COMPETITION FROM NEW TECHNOLOGIES**

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COMPETITION POLICY AND CONSUMER RIGHTS
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THE XM-SIRIUS MERGER: MONOPOLY OR COMPETITION FROM NEW TECHNOLOGIES

TUESDAY, MARCH 20, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND
CONSUMER RIGHTS,
Washington, DC

The Committee met, Pursuant to notice, at 2:23 p.m., in room 226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Also present: Senators Hatch and Brownback.

OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman KOHL. Good afternoon. This hearing will come to order.

Today we are meeting to consider the proposed merger between the Nation's only two national satellite radio services, XM and Sirius. This merger would eliminate competition between the only two satellite radio providers.

We all agree that there's no prospect for a new satellite radio company to enter the marketplace, but that does not enter our analysis. The question is not merely whether this merger would create a monopoly in satellite radio, but whether satellite radio is a distinct market so that consumers will have no real alternative should the combined company raise its price.

XM and Sirius provide a very attractive service, of hundreds of channels of music, entertainment, sports, news, and special interest content to consumers, broadcast in crystal-clear sound quality.

Much of their content, whether specialty music channels, out-of-town broadcasts of pro football or major league baseball, major entertainment talent such as Oprah Winfrey or Howard Stern, is unique to satellite radio and is not duplicated by conventional over-the-air broadcasts.

Unlike the air radio, satellite radio is a mobile national service and its channels are available in every city and every rural area throughout the Nation. The merging companies and others who defend this deal argue that there exists ample competition from free over-the-air radio and from new technologies, such as wireless Internet radio and the I-Pod, so that we should not worry. As a result, they argue the combined company will have no power to raise prices.

But we must view these claims with a healthy degree of skepticism. Over-the-air radio does not come close to duplicating the impressive array of program offerings of satellite radio. It also appears to us that I-Pods and other new technologies are either too new, too expensive, or altogether too different from satellite to be included in the same market definition.

Mr. Karmazin, the last time you came before us was in 1999 when you were supporting the CBS-Viacom merger. At that time, I told you that we thought that deal created more synergy than suspicion, and we did not oppose the deal.

So the burden of proof is squarely on you, Mr. Karmazin, to prove to us that our suspicions regarding monopoly and market power here today are unfounded.

While we do not doubt that this deal will turn out to be good for you and your shareholders, we have real worries that what may be a fabulous monopoly for you will be a real bad deal for consumers.

So, you must explain to us why competition truly exists in the market. Most of all, you must convince us that the consumers will not be harmed and forced to pay more once you have merged with your competitor.

We all look forward to your testimony and to that of the other members of this distinguished panel of witnesses here today.

[The prepared statement of Senator Kohl appears as a submission for the record.]

Our witness introductions. The first person from whom we will hear today is Mr. Mel Karmazin. Mr. Karmazin is the CEO of Sirius Satellite Radio, a position he has held since 2004. Previously, Mr. Karmazin has served at the highest levels of Metro Media, Infinity Radio, CBS Corporation, and Viacom, and we appreciate your being here. We welcome you here today, Mr. Karmazin.

Our second witness is Ms. Mary Quass, the president and CEO of NRG Media in Cedar Rapids, Iowa. NRG operates 84 radio stations, including 16 in Wisconsin. The past 3 years, she has been named one of the 40 most powerful people in radio. Senator Grassley wanted to be here today to introduce you, Ms. Quass, but he has been detained by a number of scheduling conflicts.

Our next witness is Ms. Gigi Sohn. She is the president and co-founder of Public Knowledge, a nonprofit organization that addresses communication policy and intellectual property law. She has served on the faculty of a number of universities and nonprofit and governmental boards where she lends her expertise on these issues, and we thank you for joining us here today.

Our final witness is Mr. David Balto. Mr. Balto has practiced antitrust law for more than 40 years, including stints at the Justice Department and as Policy Director of the FDC's Bureau of Competition. He is a prolific author on antitrust and consumer protection, among many other issues. We welcome you back to the subcommittee, Mr. Balto, and we look forward to your testimony.

Before we start with the testimony, would you all please stand and raise your right and take the following oath?

[Whereupon, the witnesses were duly sworn.]

Chairman KOHL. We thank you so much.

Mr. Karmazin, we would be delighted to take your testimony.

**STATEMENT OF MEL KARMAZIN, CHIEF EXECUTIVE OFFICER,
SIRIUS SATELLITE RADIO, NEW YORK, NEW YORK**

Mr. KARMAZIN. Thank you, Chairman Kohl. Before February 19 when we announced our merger, the Board of Directors of both XM and Sirius were advised by very knowledgeable, very prominent regulatory agency lawyers and they told us that, in order to get this merger approved, we were going to have to get over two hurdles.

One hurdle was that we would need to demonstrate that the merger is not anti-competitive, and second, we would need to demonstrate that it is in the public interest.

We believed then, and we believe more so today, that this merger will accomplish both of those things. We clearly believe that the competition that satellite radio faces is very robust and very intense, and will be so after the merger.

Though some people will talk about the fact that this is a monopoly, or this is a duopoly that is going to become a monopoly, the reality is that satellite radio competes with an awful lot of audio entertainment services.

We compete with terrestrial radio, the AM and FM stations, we compete with HD radio, which there's about 1,100 radio stations. We compete with Internet radio. We compete with cell phones that, when hooked up to blue tooth in a car, are able to get as many programming choices as we have. We compete with MP3 players.

We provide music, our competition provides music. We provide news, our competition provides news. We provide entertainment, our competition provides entertainment. We provide sports, our competition provides sports. There is no question that there is robust competition in this area.

In the most recent Arbitron report which measures radio listening, the combined satellite radio audience is 3.4 percent: 96 percent of the people are not listening to satellite radio. There are 237 million cars on the road today that have AM and FM radio. The AM and FM radio stations reach 230 million people. The whole idea of the Internet is growing extraordinarily. There are so many more audio choices than there has ever been before.

The NAB, which has become the most vocal opponent of our merger, has made many statements about the face of the competitive marketplace. Of course, that is before they came out against our merger.

In the broadcast ownership proceedings just two months ago, the NAB said, "The current media marketplace is robustly competitive and, indeed, bursting at the seams with consumer choice."

If you look at the public filings of all of the radio companies that they make with the SEC, every single one of them says that they compete with satellite radio. In 1998, when Sirius first got its license, and every single year since then, we have filed with the SEC and have said that we compete with terrestrial radio. So, there is no way of looking at the market and saying that satellite radio is only competing with XM and Sirius.

Let me assure you that Sirius, with our 6 million subscribers, and XM, with 7.6 million subscribers, competes with Clear Channel with 107 million weekly listeners, and CBS radio, with 53 million weekly listeners, as well as all of these other competitors.

I believe I have shown you all of the competition that we compete with, but I would like to turn my attention now to what the public interest standard would be. In that particular case, I think it is very easy, because in the case of making why this merger is good for the public interest, we offer two things: one is lower prices, the other is more choice.

So today, if you are a consumer and you want to get satellite radio and you like major league baseball and you like the NFL—Sirius has the NFL and XM has major league baseball—you need to buy two radios, you need to have two subscriptions, you need to have both mounted on your car, and it is a very cumbersome, very difficult thing for consumers to do.

After the merger, what we have said is the fact that we would offer a service that would be taking the best of both companies and doing it for lower prices than are currently offered.

So today you would need to have two subscriptions, \$25.90 a month. We're saying, after the merger, that you will be able to get it for substantially lower than that \$25.90, and you won't need two radios, and the existing radio will not be obsolete.

And after the merger, for the first time, we will have a lower-priced entry point. So today, the cheapest way you can get satellite radio is if you pay \$12.95.

We have said that we would create a lower-priced package. The reason we can create a lower-priced package, is that there are substantial synergies that come about for our shareholders as a result of that merger.

What we are prepared to do is take some of that synergy and pass it on to the consumer in the form of lower prices. We have also said publicly that what we are saying, you can hold us accountable for in the form of making sure that there are these lower prices and more choice.

One of the reasons you should understand as to why the NAB is against this, is why it is so good for consumers. The reason is that if in fact this merger happens, there will be lower prices and more choice for the consumer.

Therefore, that consumer will spend more time listening to satellite radio, and they have said that if the consumer spends more time listening to satellite radio they will, therefore, be spending less time listening to their member stations.

So, Senator, thank you for listening. I look forward to answering any of your questions.

[The prepared statement of Mr. Karmazin appears as a submission for the record.]

Chairman KOHL. Thank you, Mr. Karmazin.

Ms. Quass?

**STATEMENT OF MARY QUASS, PRESIDENT AND CEO, NRG
MEDIA, LLC, CEDAR RAPIDS, IOWA**

Ms. QUASS. Good afternoon, Chairman Kohl. I appreciate the opportunity to be here. My name is Mary Quass. I'm the president and CEO of NRG Media, which owns and operates local AM and FM radio stations in Wisconsin, Iowa, Kansas, Illinois, Minnesota, Nebraska, and South Dakota.

I am testifying today on behalf of the National Association of Broadcasters, where I currently serve as a member of the NAB Radio board. I am here to voice opposition to the proposed merger of this country's only two satellite radio companies, XM and Sirius.

Satellite radio is a national radio service that provides hundreds of audio programming channels to listeners across the United States. There are only two such services and they compete against each other in a national marketplace.

The undeniable fact is that XM and Sirius want government permission to take two competitive companies and turn them into a monopoly. If this government-sanctioned monopoly is approved, consumers will be the losers as there will be no competition to restrain monopoly rates and the power that comes with it.

Innovation and program diversity will suffer. Neither listeners nor advertisers will benefit. Let's remember that when the FCC allocated spectrum to Sirius and XM in 1997, it specifically ruled against a single monopoly provider.

The commission foresaw the dangers of a monopoly. It explicitly licensed more than one provider to ensure intra-market competition and to prohibit one satellite radio provider from ever acquiring control of the other. There is no reason to change that now.

XM and Sirius, by their own admission, are not failing companies. Their current highly leveraged position is due to extraordinary fees paid for marketing and on-air talent, including the \$500 million contract that Sirius awarded to Howard Stern, and the \$83 million bonus just this last year.

But even with these costs, XM and Sirius have made clear that they can succeed without a merger. I've heard that these companies claim that no one should worry about this monopoly because local radio competes against XM and Sirius.

Let's be clear. Radio broadcasters do not compete in the national market of the satellite radio companies, but XM and Sirius do compete in the local radio markets, markets where I operate every day, markets like Warsaw, Wisconsin.

Local radio stations can only broadcast within their FCC-defined coverage area. Local broadcasters' signals are not nationwide and are not available by subscription. The national availability of satellite radio sets it apart from local broadcasters.

NRG Media operates in small and medium markets like Janesville, Wisconsin, Spirit Lake, Iowa, and Salina, Kansas. We understand that localism is our franchise and that we have a unique connection to the listeners that no other medium provides.

We are the voice of the community in times of emergencies, like the recent ice storms in Kansas and Iowa, and for many of these areas that are no longer served by other local newspapers and outlets, we may be the only link to airing community information and things like obituaries.

XM and Sirius, by contrast, offer a prepackaged bundle of national mobile, digital audio channels. WSJY in Ft. Atkinson, Wisconsin delivers outstanding local news, sports, and entertainment. Consumers, however, would never consider my station's local programming to be comparable to a product on Sirius on one of their 133 channels, or XM's 170.

A local radio station's programming is clearly not a substitute for the array of services offered by XM and Sirius. Services like XM and Sirius compete with each other and no one else in the national satellite radio market.

I can understand why they would want a monopoly, but that does not mean that it is in the best interests of the public. Five years ago, the only two nationwide TV satellite licensees, Echo Star and Direct TV, proposed a merger that looked an awful lot like this one. They failed.

Indeed, the Department of Justice filed a complaint to block the merger and the FCC decided unanimously that the merger was not in the public interest. An XM and Sirius merger is not either.

For these reasons and others, I respectfully ask you to urge regulators to just say no to this government-sanctioned monopoly. Thank you.

[The prepared statement of Ms. Quass appears as a submission for the record.]

Chairman KOHL. Thank you, Ms. Quass.

Ms. Sohn?

STATEMENT OF GIGI B. SOHN, PRESIDENT, PUBLIC KNOWLEDGE, WASHINGTON, DC

Ms. SOHN. Thank you, Chairman Kohl.

The proposed merger presents a dilemma for public interest advocates. On one hand, the only two providers of satellite radio, which have vigorously competed for the past 5 years, are seeking to consolidate, raising questions about the impact on prices and choice for consumers.

On the other hand, this vigorous competition has led to a spending war for programming, leaving both competitors weakened in a world where other multi-channel music, entertainment, and information services have become increasingly popular.

Regardless, the salient question is this: how will consumers be better off? Will they be better off with one or two weak companies or with one strong company that is subject to conditions that protect consumer choice, promote diverse programming, and keep prices in check? I believe that if the merger passes antitrust scrutiny, the latter will best serve consumers.

The antitrust questions raised here are very complex and ultimately depend on information to which Public Knowledge does not have access. Despite the availability of an increasingly wide variety of radio, wireless, mobile, and multi-channel music services, it is unclear whether consumers would turn to these services if satellite radio prices were raised. Data on how and why consumers choose to spend their money on satellite radio and other data would be helpful in making that determination.

Even if the merger survives initial antitrust scrutiny, however, significant competitive concerns remain. Therefore, the merger should be approved only if it is subject to the following three conditions.

First, the new company should make available to its customers tiered program choices. For example, the company can make a music tier or a sports tier available to consumers which would cost less than subscribing to the entire service.

Second, the new company should ensure programming diversity by making available 5 percent of its capacity for non-commercial educational and informational programming over which it has no editorial control. This would resemble a similar requirement for DBS providers.

Third, the new company should be prohibited from raising prices for its combined programming package for 3 years after the merger is approved. In addition, policymakers should determine whether the new company should divest all, or some, of the extra spectrum it will have as a result of the merger.

There are several reasons why we believe that a properly conditioned merger would be in the public interest. First, consistent losses and slowing subscribership at both companies make it less likely that they will take a chance on alternative programming and programming that meets the needs of under-served communities.

A combined subscriber base would allow the new company to distribute the high fixed cost of a satellite system across a larger consumer base, reducing the cost per subscriber and enabling new programming and/or lower prices.

Second, consumers would gain access to channels that they would not receive unless they subscribed to both services. Third, eliminating duplicative channels will create more capacity for new and diverse programming.

I will conclude by raising two other concerns. First, Public Knowledge opposes any merger condition involving limitations on the ability of consumers to record satellite radio services. Such a condition would be tantamount to repealing the Audio Home Recording Act, which specifically protects a consumer's ability to record digital music.

Second, we also oppose any merger condition that would limit satellite radio from providing local programming. Broadcasters' opposition to this merger is hypocritical, given their own current regulatory efforts to consolidate and their decade-long history of attempts to hobble satellite radio services with content and other regulatory restrictions that are themselves anti-competitive.

Even assuming that broadcasters take seriously their duty to serve local communities, there is no reason why, in 2007, any media service should have a government-granted monopoly over local programming. Regardless of the current satellite radio companies' intent to provide local service, future services should not be barred from doing so.

While broadcasters like to talk a lot about having a level playing field, their support of programming limits and opposition to paying the same performance fees to artists that all other radio services pay instead reveal the industry's desire for government-sanctioned competitive advantage.

I look forward to your questions.

[The prepared statement of Ms. Sohn appears as a submission for the record.]

Chairman KOHL. Thank you, Ms. Sohn.
Mr. Balto?

**STATEMENT OF DAVID BALTO, ATTORNEY AT LAW, LAW
OFFICE OF DAVID BALTO, WASHINGTON, DC**

Mr. BALTO. Chairman Kohl, thank you for inviting me to testify before the hearing today. I'm here to answer three questions for the committee: is satellite radio the relevant market for antitrust analysis? The answer is yes. Does this merger pose significant anti-competitive effects? The answer is yes.

Is the promise of regulatory relief an adequate substitute for competition? The answer is, absolutely not. Agreeing to some form of regulatory relief to substitute for competition is a Faustian bargain which history has shown never pays off for consumers.

Let's go through each of those three points. Listening to the speakers today I was reminded that 10 years ago Staples and Office Depot sought to merge in a way that is really similar to this merger. Two innovative companies that had created a new product said, it's time to call a truce, let's merge.

When they attempted to justify the merger, they said everything you can buy in an office supply superstore you can buy someplace else. We account for only 6 percent of the total sales of office supplies in the United States. The FTC challenged the merger and the court enjoined it.

What the court said was 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 anti-trust purposes.

When the court looked at what office supply superstores offered, it said Staples and Office Depot offered was something different than what was offered by all these other forms of distribution that sold identical products. The same is true of XM and Sirius and the alternatives that they suggest are competitors.

Let's just look at that. Turn to page 3 of my testimony and look at this statement from Sirius's web site: "The biggest difference between Sirius is that it's commercial-free, it offers you music the way it should be, it gives you the breadth of programming no one else can match, and we give you live entertainment."

In my testimony I described how satellite radio is different than every alternative that the parties have mentioned: they have the capability of aggregating demand; they provide you ubiquitous service wherever you go; they provide you a greater level of product variety; they provide diverse formulated programming; they have DJs who figure out what the most entertaining forms of media are; then finally, although I'm not sure this is a credit to society, they provided unregulated content. I think if you look at each of those factors, you'll see that satellite radio is different.

But the key factor is, do these alternatives to satellite radio have the power to constrain price increases? That is not the case. Satellite radio has been able to increase prices in the past, unrestrained by other alternatives.

The second factor, are there concerns about competitive effects? Absolutely. The most problematic merger is one that creates monopoly. Why? Because the antitrust laws don't allow us to go in after the fact and second-guess the decisions the monopolist makes and say, for example, you're charging too high a price.

These parties have said don't worry about the merger—we don't compete as aggressively with each other, but that's belied by the statements on their 10(k) and on their web sites.

They are also suggesting don't worry, there's new technology that's right around the corner that's going to change everything.

When I was an FTC staff attorney we heard that argument all the time and we accepted it when that technology looked like it was truly right around the corner. The Merger Guidelines and the law make clear that, for new alternatives to be in the market, to serve as a likely restraint on anti-competitive conduct, they have to be timely, likely, and sufficient to prevent competitive harm. And by timely, we mean a 2-year period.

Now, I don't think those alternatives can meet that standard, but even if they could, none of them offer the cluster of services that are offered by satellite radio.

Finally, let's talk about the promise of a benevolent monopolist—the merging party's promise not to increase prices. I'm here to tell you what you already know. In over 100 years of the Sherman Act, courts have almost never permitted anti-competitive conduct or anti-competitive mergers based on a promise not to increase prices.

Sometimes State regulators have agreed in the context of hospital mergers to cap prices and consumers have suffered. At the end of the day, you're left with a monopolist and a monopoly is forever. Consumers suffer through higher prices and less service.

In ways, the promises here remind me of the movie, "It's a Wonderful Life". You will remember, Mr. Potter makes an offer to George Bailey to sell out to his bank, which would give him a monopoly. Well, we know from the movie what would have happened if that had occurred. There would have been less affordable housing, fewer small businesses, and the loss of countless other benefits for consumers.

Now, I'm not suggesting the management of the merging satellite radio monopoly have the nefarious desires of Mr. Potter. However, Mr. Kapra teaches an important lesson for this committee, and for antitrust enforcers: it is only competition that can guarantee consumers the full range of benefits in terms of low prices, better services, and greater choice. Nothing can replace competition.

[The prepared statement of Mr. Balto appears as a submission for the record.]

Chairman KOHL. Thank you for your statement.

Before we start with our questions, we very much want to recognize and welcome the Ranking Member on this committee, Senator Orrin Hatch. We'd like to hear whatever comments he wishes to make.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I am sorry I am a little bit late to this hearing, because I know how important it is. It is an important antitrust set of questions.

Does the merger of satellite radio's two broadcasters, XM and Sirius, violate antitrust law? Now, I have looked forward to this hearing and I certainly have enjoyed the papers that have been submitted.

The question is, will consumers be held hostage by a monopoly that is able to charge exorbitant rates for services that cannot be found anywhere else? Will the efficiencies that are created permit additional services and content to be provided at the same cost to consumers?

First, I think we've got to look at the legal question. In order to do that, we of course have to know what the law entails. Simply stated, there are three Federal antitrust laws applicable to horizontal mergers such as the one we're examining during this hearing.

First, is Section 7 of the Clayton Act which prohibits mergers which "may substantially lessen competition". The second major statute is Section 1 of the Sherman Act, which prohibits mergers that constitute an unreasonable "restraint of trade". Finally, Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition".

But these are general phrases which can mean a number of things, so how do we better define them? For that, many turn to the commentary on the horizontal merger guidelines of 2006, jointly published by the U.S. Department of Justice and the Federal Trade Commission.

Though not formal governmental rules that bind these agencies' actions, they are widely consulted and exert a broad influence on antitrust analysis. So how do the commentaries interpret the laws we just described?

The agencies state that "the 'core concern of the antitrust laws' is the creation or enhancement of market power. In the context of sellers of goods or services, 'market power' may be defined as the ability to profitably maintain prices above the competitive levels for a significant period of time. Market power may be exercised, however, not only by raising price, but also by reducing quality or slowing innovation."

Therefore, that may be one of the central questions before us. Will this merger unlawfully create or enhance market power? How do we begin to answer this question? Once again, the guidelines provide a road map for us to launch our inquiry into the form of a five-part test which is used by the DOJ and FTC to analyze mergers.

Now, I believe for this hearing that the first prong of that test, called market definition and concentration, offers us the greatest insight into the legality of this transaction, which leads us to examine how we would define the market in which XM and Sirius compete.

The guidelines "indicate that the relevant market is the smallest or narrowest collection of products in geographic areas which a hypothetical monopolist would raise prices."

In the case before us, that means we have to examine questions such as, satellite radio and terrestrial radio are part of the same market. If there are sub-markets, what role will future technologies, such as Internet radio, play in defining this market? Should consumer electronics like I-Pods be considered as part of this market, just to mention a few aspects?

Now, these are important questions, Mr. Chairman. I appreciate the witnesses and their elucidation in these areas and, frankly,

hope that we can do what is in the best interests of consumers, and also keep these innovative, really spectacular products moving ahead for the benefit of the American people. I will do everything in my power to try to make sure this comes out all right.

Thanks, Mr. Chairman.

Chairman KOHL. Thank you for your statement, Senator Hatch.

Senator Brownback, do you have any comments to make?

Senator BROWNBACK. I don't, Mr. Chairman. I would like to ask questions, if I could, of the panel when the appropriate time comes. I want to thank you for holding this hearing. It's a topic I'm very interested in and would like to pursue with some questions for the panelists.

Chairman KOHL. We appreciate your being here.

We'll start with questions for Mr. Karmazin.

Mr. Karmazin, critics of your deal claim that this deal with result in a monopoly, leaving customers with no choice but to pay a likely price increase whenever it occurs.

Now, we know that you defend your merger by claiming that you won't have any power to raise price because you really compete with a multitude of ways consumers can obtain audio content. But as I said in my opening statement, the burden—and we all understand this—is on you to prove your position.

So there are two major issues we need to examine today. First, will this merge give you the power to raise price to consumers? And second, how do we define the market? That is, what services and devices do you really compete with? So I'd like to start by asking some questions about the first issue.

I know you promised not to raise prices right away, but a primary concern of antitrust analysis is not the promise, but the ability of the merged firm to raise prices after a merger, whatever promises are made before the merger.

Mr. Karmazin, after this merger, consumers who wish to listen to satellite radio will have only one company from which to choose. So isn't it reasonable for us to believe that this merger will give the combined Sirius/XM the ability to raise the price for satellite radio consumers?

And don't you believe that the consumer who has already decided to pay \$12.95 for satellite radio would pay another dollar or two if you decided to raise the price after the merger?

Mr. KARMAZIN. Thank you, Chairman. No, I do not believe that we have the ability to raise prices to a vast majority of the audience. If you think about it, we charge \$12.95. And by the way, we've charged \$12.95 from the day we began service 5 years ago, so we have not raised our price ever.

That includes when we only had 100 channels as compared to the approximately 135 channels. The reason that the price has not been raised is because we are competing with free. I don't quite understand how, if you raise your price a couple of dollars to \$14.95, you'll be better off competing with free than if, in fact, you're competing with free.

Also, the argument that says that we are competing with XM, if we had all of XM's subscribers, so instead of them having the 7.6 we managed to get all of them or they managed to get us, that is not a successful business. We're looking at the 300 million Ameri-

cans that are there today, not us winding up just with the number of people who are subscribing to satellite radio.

So, our belief is that the vast majority, over 90 percent of the American public, are getting their radio for free. We want to convince them that our 43 cents a day that we charge is money well spent, and by raising the price we don't see it.

But we've also said that, you know, we've set it, our actions have demonstrated it, that we have not raised our price in the 5-years for the reason I told you why we haven't, is that we are willing to be held accountable. If that's the issue, it seems simple. I mean, if the argument is that we're going to raise our price, we're not. We're not.

So it sort of seems to me it solves that issue, and I'm sure somewhere in the government somebody could find a way to make sure that we don't raise our price if we're saying we aren't going to raise our price.

Chairman KOHL. Well, when you say you're not going to raise the price, can we take you at your word and subject any price increases over the time duration of your company to some sort of ratification by some bureau, you know, of government?

Mr. KARMAZIN. Excuse me. I'm open to working—

Chairman KOHL. Some bureau of government.

Mr. KARMAZIN. I'm sorry. I'm willing to work with the regulators on what we need to do to give assurance that, as a result of this merger, there's not going to be a price—as a matter of fact, what there is going to be, is a lower price. All right. A lower price.

And we have said that, today, the lowest price entry is \$12.95. We're going to offer a service that will be available for \$8.95 or \$9.95, or some lower price, mainly because of the synergy of the merger.

You know, our company, last year, lost \$1 billion. And by the way, the NAB representative is correct, we're not making a failing company argument. But we've lost \$1 billion last year and we've lost, cumulatively, \$3.8 billion. The way we make this company, is a profitable company. The way we do it, is by getting more subscribers. We don't see how you get more subscribers than you have today by raising the price.

Chairman KOHL. Initially that's true. Then that's how you build a business. You keep your price at a certain point, and when your subscriber level gets to the point that you require it to be, and if you're in a monopoly business, if we could demonstrate that it is, then you raise your price.

It's a business model which you have a perfect right to pursue, if we allow you to pursue it. There's nothing, per se, illegal about it. But again, you said we are not going to raise the price. You keep on saying that, and that's great.

Are you, as a condition of merger then, ready to be regulated in terms of price increases, if at all, if ever or whenever, by having to go through some kind of an independent agency to get authority to do that? It's pretty much of a yes or a no. Are you?

Mr. KARMAZIN. It's a yes or a no. I'm willing to say to you that we believe the marketplace will control it, and our statement. But if, in fact, there is any proposal or any condition, we would be open

to hear exactly what it is because we want to do this merger, Senator.

The reason we want to do it, is that there are benefits to our shareholders, which you've pointed out, and we're not ashamed of that. We believe that that is a fact. But we're willing to make it, also, a benefit to the consumer and we're open to sit and work with the FCC, and the DOJ, and this oversight Committee in giving you the assurance that what we're saying, we want to be accountable to. And I don't mean just for the first year or two.

Chairman KOHL. So in theory, while you're not agreeing to this in fact, but in theory, you would be willing to consider a discussion that would subject any intended price increases to oversight, regulatory oversight?

Mr. KARMAZIN. It seems—

Chairman KOHL. Yes?

Mr. KARMAZIN.—totally unnecessary, but it strikes me that if there's something you want us to consider, we'd be willing to consider something.

Chairman KOHL. All right. I'll ask one or two more questions, then turn it over to Mr. Hatch.

Let's talk about market definition, Mr. Karmazin. You contend other means of receiving radio entertainment, such as over-the-air radio, I-Pods, and Internet radio are all part of the same market.

But even if we define the market this broadly, wouldn't it be appropriate to believe that Sirius and XM are their own two closest competitors? When we look at price and service competition and innovation, aren't you basically targeting each other today?

Don't XM and Sirius offer a unique cluster of services in audio entertainment and news options not provided by any of the other entities? I recognize that you can get some of these on I-Pods, some on over-the-air radio, some by singing to yourself, in fact. But no one else offers the cluster of options, isn't that true?

Isn't it true that Sirius and XM are your own primary and main competitors, that the services you offer—which is really what you're asking \$12.95 for—are unique and distinct and different such that you can ask \$12.95 a month, and maybe more? If you weren't offering a distinct service not obtainable in any other medium, how could you get away with charging \$12.95 when they're charging zero?

Mr. KARMAZIN. And the reason for it is that we have convinced, at this point, between two companies, 13 million of the approximately 300 million Americans that the services that we offer are worth subscribing to.

And if you ask me, do I think about how I'm going to get more of XM's subscribers, no, I think more about how I'm going to get more Clear Channel listeners to become subscribers.

We do very little churn between the two companies. If you take a look at the number of people who leave one service and subscribe to the other, that number is very, very tiny. So the competition is free radio. It's not a technology that is going to be here 2 years or three years from now, it's technology that exists in the marketplace today.

XM is a competitor, but I will tell you that CBS and Clear Channel are better competitors. If I had to set my sights on who is the

one who I think about more, who is the one I'm looking to get subscribers from, it's far more from them, the terrestrial radio, than it is satellite.

Chairman KOHL. Well, of course, because at the moment, because they've been in business all these years. You've only been in business for a few years. You haven't developed your model yet. You haven't figured out how to do it, which you will. Of course they have most of the customers at the moment for the business, and they're free. But they're your main competitor, I think.

And Mr. Balto, I know you have some very strong feelings on that. Would you express yourself?

Mr. BALTO. Yes. Let me start off with just the point about regulation. Three things to keep in mind. First of all, a monopoly is forever. There's no question here, you're only going to have one satellite radio if you agree to this.

Now, are you willing to agree to some form of regulation that also is forever? Because otherwise your grandchildren are going to be paying monopoly prices.

Second, I think the FCC's record in regulating in this and adjacent areas is not a good one. If you look at the problems with cable regulation, they don't show a terrific record of being able to effectively regulate a monopolist or near-monopolist.

Finally, regulation might cap the prices of satellite radio, but it doesn't protect other forms of competition. It will not protect the competition that would lead the two of them to compete to lower equipment prices. It doesn't protect the competition that would lead to them providing greater product variety and greater choice. So, I think regulatory relief is inadequate.

As to the relevant market, if I'm in a small town in Wisconsin or Utah, my terrestrial radio options are extraordinarily limited and none of the rest of these alternatives, none of them, can provide the same cluster of services that satellite radio provides.

Just as the court found when it looked at the Staples/Office Depot merger, satellite radio offers a distinctly different service. No other office supply distribution was comparable to going and shopping at a Staples or an Office Depot, even though you could get the same things elsewhere.

Chairman KOHL. Thank you.

Mr. Hatch?

Senator HATCH. I was a little upset at your bringing Utah into it, is all I can say.

[Laughter.]

Mr. Karmazin, most of our concern is about the content of your programming and what the content will look like if the merger is finalized. Specifically, I understand that both XM and Sirius have faith-based music channels. Now, is it reasonable to believe that the number of these channels will be reduced in size if this merger goes through, or at least cut in half?

Mr. KARMAZIN. No. I don't think it's reasonable to assume that at all, mainly because of the popularity of the Christian channels that we are currently broadcasting. So, they are some of our popular channels and you should not automatically assume that there will be a reduction.

Senator HATCH. OK. As you know, I have dedicated a considerable portion of my service here in the Senate to protecting children. I was one of the principal authors of the Adam Walsh Act, just as an illustration, and the author of the SCHIP bill, et cetera.

Now, what actions are you taking now, and what actions will you take in the future if this merger is finalized, to protect children from listening to some of what I would term more aberrant programming that may be currently offered by Sirius?

Mr. KARMAZIN. Yes. We believe that parents, obviously, should be able to control the content that is coming into the car or into their home. We currently are able to, unlike my days in terrestrial radio where there was no way of restricting what comes into the home in over-the-air radio, we have the ability to black out channels.

Either the consumer can do it on their own device or, in fact, we can do it from the head end to make sure that any channel that somebody doesn't want is not there. We also, earlier this afternoon, put in a filing with the FCC of our license and included in the license what we have said in our application, is that anybody who chooses not to receive any content, any adult content, not only has the ability to block it, but there would be a cost reduction to their bill in a more *à la carte* way.

So that the argument is that if somebody doesn't want it, it's not only that they're not getting it, but they're also not subsidizing it somewhere else. So we do believe that we are entitled to have content that adults want to hear. We are restricting it. It is a pay service. We're making sure that that the parents have all the information on that content and they can restrict it and not pay for that service.

Senator HATCH. Well, thank you. Now, your underlying contention in promoting this merger is that the satellite's true competitors are other radio platforms, including music played over cable and the Internet. True competition, however, is premised on equal footing.

Do you agree then that satellite services should be required to protect content in the same way that cable and Internet services are required, under Section 114 of the Copyright Act?

Mr. KARMAZIN. Yes.

Senator HATCH. Ms. Quass, when reviewing a merger and defining a relevant market, the Department of Justice and the FTC are supposed to look for the "smallest collection of products in geographic areas within which a hypothetical monopolist would raise price significantly."

Now, some such as Mr. Balto would argue, with some merit, that satellite radio is a separate market, independent of terrestrial radio, therefore, the merger should be evaluated in narrow terms. That would be the argument.

If so, why does the National Association of Broadcasters take such a particular interest in this merger? Aren't you very concerned that satellite directly competes with terrestrial radio?

If that's true, why then should the Department of Justice and the FTC not look at this transaction in terms of a market that includes satellite and terrestrial radio?

After Ms. Quass answers, I would very much like to hear Mr. Balto's thoughts as well.

Ms. QUASS. Thank you, Senator. Let me see if I can answer that question in terms of the market. The satellite radio market is really XM and Sirius. They compete on a national platform and are a bundle of national mobile digital audio channels that, in and of themselves, are the only two that can provide that function.

XM and Sirius compete with local broadcasters in the markets that we serve. As was mentioned, it's all about share of audience. As was also mentioned, it's not a level playing field.

While we don't disagree that a competitive field is what we operate in and what we welcome, and the challenges that it brings, an unfair playing field severely hampers our ability to perform the services that we provide on a daily basis.

There are a number of reasons that XM-Sirius and the proposed monopoly are of concern to local broadcasters. One is, as I mentioned, an unlevel playing field. We cannot provide the same type of services. We cannot bundle services to provide 200 and 300 channels; we can barely do 6 or 8.

We do not have two revenue sources with which to be able to operate from an advertising, and also subscription, model. We, unfortunately -or fortunately, depending on how you look at it—operate within constraints of coverage areas that are granted to us by our license, where we protect not only fellow broadcasters who have signals that we try not to interfere with, we also have public service obligations that, I might add, broadcasters take very seriously.

We feel it's very important to live and to work in the communities that we serve and to become an integral part of it. But the pressures that we face to compete cannot be matched with XM and Sirius and their ability to be able to provide national mobile bundling of services.

You know, in a competitive field, if you look at our competitive environment in a Warsaw or Salina, you name the community, what we have the ability to cover in our area to cover is limited, where XM and Sirius together, if they were the U.S., we would be a cornfield. So it's sort of an unfair playing field which we have to deal with.

And another concern is the ability to be able to control, potentially, lock-up programming that we would not have the ability to be able to provide as a result of this monopoly.

Mr. BALTO. First let me explain the point about the smallest collection of products. The reason why the antitrust laws define markets in terms of the smallest collection of products, is because the law says that it protects competition in any line of commerce, any group of consumers is protected.

So even if we're talking about only 14 million people who vote with their pocketbooks every month and pay \$13 a month, that's still a group of people who deserve the protection of the antitrust laws.

Second, why are the interests of the NAB coincident with the interests of consumers, and I think they are? The reason is the programming point that Ms. Quass just made. A monopolist in satellite radio can get exclusive programming and harm traditional radio and consumers.

One of the big controversies in cable TV and satellite TV is exclusive rights to programming. Your colleague, Senator Specter,

has raised serious concerns on the issue involving NFL Sunday Ticket.

Now, exclusive programming is not at issue right now with satellite radio, but who knows? Maybe a few years down the line, maybe when they become a monopolist, then all of a sudden the only way we may be able to have access to Washington Redskins broadcasts are by subscribing to satellite radio.

Let me make one more point about the faith-based radio that you started with, Senator Hatch. If I wanted to come up with a Jewish radio station and broadcast it nationally, I have two alternatives who I can currently play off against each other, XM and Sirius. And, like in any competitive market, that will give me some kind of advantage—a greater ability to secure an outlet and get a fair price.

But if they become a monopolist, there will be only one person who is going to determine what gets on satellite radio. If you want to have a regulator, that's fine. To protect content diversity you'll have an FCC religious regulatory regulator determining what the religious content of satellite radio is. I don't think that's something anyone could stomach.

Senator HATCH. Ms. Quass, let me just say, in your written testimony you state that "XM and Sirius will be able to exercise virtually unlimited market power in the national radio market, to the detriment of consumers."

But is that really the market that we should be primarily concerned about? For instance, is not the real profit market found with those customers in such traditional market segments as the so-called "morning drive"? And are these not the customers that you're truly concerned about?

Ms. QUASS. Well, Senator, certainly I'm concerned about the customers that listen to our radio stations in a morning drive situation. But we really need to make the determination here between one entity that would have the ability to control programming on a national level.

I have the ability to control—even if you aggregate all of the radio stations across the U.S., we all individually only have the ability to control the area which our coverage area allows us. We are not able to act as one unified body across the United States unless the rules change and, all of a sudden, we have one entity that all 14,000 radio stations—which I doubt seriously is a possibility.

So the concerns that broadcasters have is, our business is content-driven. Granted, it's local content. It's a very big part of what it is that we do. We serve, on a day-in and day-out basis, those people in our local communities, giving them the kinds of service that we take seriously. We're constantly trying to improve programming so that we continue to have an audience that listens to us.

But there is nothing that we can ever do that will be able to aggregate the kind of audience and have the kind of control that one organization will, to be able to lock up content and programming and take it away from local broadcasters, to many of us, which is exactly what we try and do on a daily basis, to bring to our local communities.

Senator HATCH. My time is up, Mr. Chairman.

Chairman KOHL. Thank you, Senator Hatch.

Senator Brownback?

Senator BROWNBACK. Thank you, Chairman. I appreciate it. I thank the panel for being here.

I'm going to ask a couple of questions along the line of content and the content monopoly area, that I want to tie these in together.

Mr. Karmazin, thank you for being here and thank you for stopping by my office this morning. We've crossed swords in the past on content issues. I hope to be very respectful of your business model, but I think I have got some comprehension and understanding of it a bit, too.

It seems as if a fair portion of your business model is based upon featuring explicit sexual material. I'm sure you might categorize it as somewhat differently, but I think there are others also that would categorize it as pornographic.

I want to talk with you about that, because you can do that, where Ms. Quass's stations cannot. She is regulated in that field on content for the public good. We've had a big tussle about that here. We've even increased the fines now tenfold for her set of stations that she has, radio and television, on content and material that would be considered overly sexual, overly violent.

There have been discussions about how you define that, a lot of discussion, a lot of difficulty. But, still, you are not subject to that set of regulations, and are obviously not willing to be subject to that set of regulations, and that's part of your business model.

Is that a part of your business model you're going to continue even as a merged set of companies?

Mr. KARMAZIN. Yes. We provide content for a broad spectrum of the American public, including some adult programming. I mentioned what we do in allowing people to not have that content that they may not want to come into their home.

But, yes, we believe that not all content that's available needs to be only content that's acceptable to children. I don't believe that was ever the intent of anyone who made the rules. And I also understand, it's been a while.

I was in the terrestrial radio business for about 40 years and I'm not following latest developments, but I also understand that the local broadcaster has a safe harbor as it applies to that, not that they necessarily want to use it, but the fact is that there is a safe harbor for them to be able to do adult content as well.

Senator BROWNBACK. And would you be willing to submit yourself to the same regulations as the terrestrial broadcasters would on content and safe harbor?

Mr. KARMAZIN. No, I would not.

Senator BROWNBACK. All right.

Mr. Chairman, I'd like to enter into the record, if I could, the web pages for Sirius Satellite Radio. These are three pages I'd like to ask unanimous consent to enter into the record.

Chairman KOHL. Without objection.

Senator BROWNBACK. And this is Playboy Radio. Question & Answer, I believe, is one of your channels. Night Calls is one of your programs I believe you listed here as one of your signature shows: "Two legends of the adult industry, special celebrity guests will keep the dialog entertaining, the temperature rising," is how you describe it here in your materials."

Private Calls is a daily show: "Sharing most intimate moments with special guest hosts and porn stars. We'll give you a peek into their lives," is the way you describe it on your web sites.

Sexy Stories is a daily show that you have: "Finest providers of sensual audio in the entire world, presenting 60 sizzling minutes," I believe, is how you describe it in your own material.

Ms. Quass, are these shows that you can do in over-the-air radio broadcasting?

Ms. QUASS. No, they are not. And I might also just add that, while I appreciate the concern for being able to opt in and out of programming by the subscriber, we're also concerned about the ability for some of the technology that is used to carry satellite programming and the ability to bleed through into terrestrial or over-the-air radio without concern for whether or not that individual opted in or out, as a way to be able to also further enhance the concerns that we have.

Senator BROWNBACK. Mr. Karmazin, I mentioned to you in the meeting we had this morning about the issue of the spread of pornography in the culture and in society. I mentioned a book to you, Pornified. Actually, we held a hearing in this Committee on the spread of pornography.

I mentioned to you as well about, I think you said, well, OK, we want to maintain material for adults and we're not going to let children get into this material. I mentioned to you about, this does impact children.

In a recent meeting of the American Academy of Matrimonial Lawyers, two-thirds of the divorce lawyers who attended said that excessive interest in pornography played a significant role in divorces in the past year.

Pornography, by itself, has begun to arise with alarming frequency in divorce and custody proceedings, according to divorce experts. This is a relatively recent phenomena. One expert stated that pornography had an almost non-existent role in divorce just seven or 8 years ago.

I mention those two you because I don't know—and maybe you do believe this—that this is done in a vacuum or that this can be controlled in just an adult atmosphere, so therefore it has no impact on children or the broader society. I think the body of evidence is building that it isn't done in a vacuum and that it does have an impact on a broader society.

As I mentioned to you this morning, I'll be sending you this book and I'd appreciate it if you have a chance to review it.

Mr. Balto, I wanted to ask you, on this point, if we grant this monopoly and this monopoly has this ability to market a particular type of material, is that something we're going to see evolve over time?

You seem to think that we're not very good about regulating monopolies. Is this going to be something that will be used in marketing by a monopoly over a period of time or have you had a chance to have a thought about this?

Mr. BALTO. Thank you for the question. I think, again, you can regulate in this area. You have chosen not to regulate satellite radio in this area and that's something you can address.

However, what you have right now is competition between two satellite radio services and this has an impact on content. If you look at the web site of XM, they specifically identify the sort of X-rated radio programming and instruct how to install parental controls. Sirius does not provide this information.

That occurs because there's always a need for XM and Sirius to differentiate their products. And who knows? Maybe one day it leads to one of them saying, we're not going to have adult content on our satellite radio, we're going to differentiate ourselves.

If you accept the offer that these firms propose, you won't have that competition, perhaps leading to the kinds of programming choices to keep this kind of content off the radio.

Senator BROWNBAC. Mr. Karmazin, would you agree right now to not put pornographic material on the combined stations?

Mr. KARMAZIN. Senator, I really don't know what you would categorize as pornographic material. So, you know, much like I said to you, I'd be welcome to buy the book, but I'll take you up on your offer to send it to me free, I'd be interested in knowing if satellite radio is covered in that book as being one of the issues that lead to pornography.

I think one of the issues is that we are a believer in the First Amendment. I've been a broadcaster for a long time. I stand strong in that regard and I believe that, in the area of indecency, that there is the ability to disagree over what might be considered indecent. We certainly are not interested in airing, you know, any obscenity. I just don't know, sir, what you would call pornographic, or what somebody else would call pornographic.

Senator BROWNBAC. So you're not willing to say, now, by any definition, that you will not limit your material on pornography.

Mr. KARMAZIN. Senator, it's an easy "yes" for me to give, but I'm not sure that I can truly live up to it because I'm not sure that I understand what the standard would be, and I don't want to just give you lip service. So the answer is that, no, I'm not able to give you that commitment.

Senator BROWNBAC. Well, I thank you for your candor on this. We've had discussions before. We've got a big problem in the country on this. I know, perhaps, you don't see it as much. But the National Council on Sexual Addiction and Compulsivity estimates 6 to 8 percent of Americans are sex addicts, and that almost all of them begin with pornography.

Other studies estimate that at least 10 percent of the entire population is dealing with sexual addictions. Forty percent of sex addicts will leave or lose their spouses; 58 percent of sex addicts will have severe financial difficulties; 40 percent of sex addicts are professionals who will lose their profession; 27 percent of sex addicts will lose their jobs or be demoted. I realize that's not your issue or your problem, but it is mine, and I think it is the country's problem.

We need to have respect for the First Amendment, but we also have to have respect for what's taking place here. You've got a particular business model taking advantage of an area that Ms. Quass's group cannot, thankfully, take advantage of.

So to put that now in monopolist hands does seem to raise a significant question in a big area, and an area you're not willing to

say, honestly, that you're willing to limit yourself to. So, I respect that, but I do have problems with it, Mr. Chairman.

Chairman KOHL. Thank you, Senator Brownback. Just to get back this whole discussion of what we're talking about here today, which is what all of us are doing, of course, you know, I have to lay it out to you, Mr. Karmazin, and to the panel members, repeating much of what you said and trying to see it in the context of the totality of what we're discussing here.

I think what you're asking for, and you have every right to ask, is a unique monopoly, an ability to perfect a business model in terms of radio, or communication over the air, radio satellite, to present a product to the American people that is unrivaled, unequaled, and really not to be competed with just by the very definition of what it is that you are presently offering and want to, by combining with the other entity—it is so unique, that I think in 10, 20, 30 years, it will be a business colossus in this country that would be almost unrivaled.

It is not entirely different from having over-the-air television and one cable operator in the United States. I mean, we cannot imagine that being done in this country because the power and the profitability of that cable operator to attract all the most attractive events by being able to offer much more than over-the-air, like NFL, or the basketball, or the baseball, or whatever, they would be so profitable, so powerful, so dominant, with no competition, that over a period of time it would be a behemoth that probably the government would have to step in and reverse whatever decisions it had made not to allow it to go any further.

To some extent, on a somewhat smaller scale, because radio is not television in this country today, but radio is huge. If you are given the power to have the only state-of-the-art, perfect radio presentation in terms of what you can offer that nobody else can offer, wow, what an opportunity over a period of time. You say, well, we only have, what did you say, 13 million subscribers. Fine.

But if you were able to get the NFL for a zillion dollars, your subscriber level would go up to 100 million right away, 150 million, 200 million, and you would do this because it makes good business sense to do it. That's the only reason you would do it.

So your ability to raise your subscriber level is only circumscribed by the kinds of agreements that you could, and would, make with the presenters of the most desirable kind of programming in this country. That's what goes on on television.

That's why, you know, more and more sports television events are going to cable. More and more businesses, various business entities in the NBA, major league baseball, and the NFL are moving toward cable, because that's where the real revenues are, and cable understands that and they're snapping them up, one after another.

The same thing will happen on radio, Mr. Karmazin, if you are put in a position to be able to do it, and you have every right to ask if there is nothing immoral, unethical, or even begin to say illegal at this time. But it's another thing for us to grant you that permission, to be virtually unrivaled, unchallenged in this whole area.

Now, just to finish up the question so you can answer. As I understand it, most all of radio is listened to in the automobile—not all of it, but the largest chunk. So what you are doing, and what

you will continue to do, and you should, go to all the automobile companies and get them to produce automobiles that automatically have the technology to incorporate satellite radio so that people who buy a car just have to say, OK, start charging me \$12.95 or whatever you're charging, and I can have your satellite radio. They will do that just because people trade up. That's America. We want more, we want better.

As long as the price is somehow within what we can afford, which you will calibrate over the years, you will get everybody who's interested in radio, just like more and more people are on cable nowadays.

Over a period of decades, more and more and more people will gravitate to your business, and you have no competition. You have no competition. What a business! I might quit this job to go into your business.

Mr. KARMAZIN. Senator, with all due respect, where do I start? You're dealing with the fact that we are a monopoly. I assume you're automatically assuming that the Internet does not exist and that there are no audio services on the Internet.

I'm assuming, sir, that you're assuming that when all of the car companies are providing a jack for somebody to plug their I-Pod into and the I-Pod has all of the content that's available, including talk programming and sports programming because it's available on the I-Pod, and I'm assuming, sir, that in the telephone, where the largest telephone companies are providing all kinds of content, not just music content, but sports content, and in your vehicle you take your cell phone and you put it into your dock and you have blue tooth technology and the content that's in your cell phone comes right through the speakers on your radio, it is bizarre that the thought is that there isn't all of this competition. There is all of this competition.

We're not talking about being a monopoly. I know the NAB has used those words about monopoly in this context. If it was a monopoly we wouldn't have wasted our time in trying to get this merger approved. We understand people don't like monopolies. What we're saying is, there is all of this competition. And by the way, Mr. Chairman, we do have the NFL, and we've had the NFL for three reasons. We have the 6 million subscribers in spite of having every single NFL game that's broadcast.

The content that's available on satellite radio, that same content is available on the Internet and it's also available on cell phones, and it's also available. The fact that there is this HD radio, and by the way, there is no reason that HD radio is not ultimately going to evolve into a subscription service. They may choose, in the early days, to not have that have a second stream of revenue.

The last point that I think is worthy of mentioning, sir, is the fact that our total advertising—now, we have been in business now for well over 5 years. Our total advertising, of the combined company, is under \$70 million. Under \$70 million of \$21 billion. To think that we're dealing with a monopoly is just not reflective of the marketplace.

Chairman KOHL. Well, just a couple of points. I-Pod, which you mentioned as your competitor—and of course, in a theoretical way it is—I-Pod has virtually no live broadcasts. So you cannot say,

well, if you want to listen to the baseball game you can get it on satellite TV and you can get it on I-Pod. Well, that's not true.

Mr. KARMAZIN. If you want to listen to music, you can certainly get it on I-Pod. If you want to listen to—

Chairman KOHL. But is it true about sports?

Mr. KARMAZIN. But sports is available on a cell phone, sir.

Chairman KOHL. OK. But you mentioned I-Pod.

Mr. KARMAZIN. And I mentioned cell phones.

Chairman KOHL. Yes, you did. But—

Mr. KARMAZIN. So in the case of sports today, I don't know if there's anything in the technology that precludes the content owners of sports content from doing a transaction.

Chairman KOHL. But today, I-Pod does not carry live sports.

Mr. KARMAZIN. Not to my knowledge, sir. I agree with you.

Chairman KOHL. And I just want to mention your web site. The Sirius Internet web site has a section on the merger in question and answer format. One question that is posed is, "Should I wait until after the merger 'to get Sirius?'" And your answer is, "Are you kidding? Well, if you like commercials and you like listening to the same CDs for a week, and you like fiddling with your MP3 player while driving." It says, "No, you'd be crazy to wait."

Well, Mr. Karmazin, isn't this an explicit statement that you promote satellite radio as a very different—very different—and a very superior service that is not to be equated with all these other things that you're mentioning? That is your business model. That is what you are trying to create. Once we give you monopoly, my man, over a period of years, because you're smart, you know how to do it, you will do it.

Mr. KARMAZIN. But Senator, you just made my argument.

Chairman KOHL. How did I make your argument?

Mr. KARMAZIN. Because you just read all of the factors that we're talking about as to how we compete with terrestrial radio. We didn't sit there and say that you shouldn't do it because we're competing with XM. All of those points that you just raised demonstrate the fact that we compete with terrestrial radio.

Chairman KOHL. You have developed, and will develop much further, because you have the capacity in this technology that you own, to develop a business model which cannot be rivaled by any kind of a radio station in any market.

Mr. KARMAZIN. Sir, it—

Chairman KOHL. We know that. I mean, that's clear. If I want to hear any one of the football games on Sunday, or the basketball games every night, or the baseball games every night, if I want to hear any of them at will, the only place I can go, or will be able to go, is to your technology.

Mr. KARMAZIN. No, because you can get those same baseball games on the Internet because they're available. The NFL, the NBA, and the major league baseball all offer services where they have all of their games on the Internet. We have a deal with NASCAR to where we provide NASCAR on satellite radio. NASCAR is also available.

Chairman KOHL. But isn't it true that they will not be able to get it on the radio? They will be sidelined by your technology.

Mr. KARMAZIN. No.

Chairman KOHL. The radio will be sidelined by your technology.
Mr. KARMAZIN. Terrestrial radio will still get their local games if they want to.

Chairman KOHL. Local games, yes. But—

Mr. KARMAZIN. Excuse me. There's Clear Channel and a lot of the broadcasters who operate nationally. This goes back a while, but the Dallas Cowboys—

Chairman KOHL. I want to ask you a question. Can you listen to Internet in your car as you drive?

Mr. KARMAZIN. Yes. Wi-Fi if going to enable you to be able to listen to it while you drive.

Chairman KOHL. That's not entirely true.

Mr. Balto?

Mr. BALTO. I have four simple points. First, in terms of alternatives, remember the relevant market is the cluster of services offered by satellite radio. None of the rest of these things offer the cluster of services. None of them are in the relevant market.

As to I-Pods, read page 6 of my testimony and you'll see, it's a cumbersome and uninteresting process to compete on your own by loading your own music, and then you miss the great DJs of Sirius radio.

The second point. Are these things viable alternatives, Wi-Fi, HD radio? Remember that the merging monopoly has relationships, ownership interests with some of the major car manufacturers. Are they going to put HD radio in my car? Are they going to put Wi-Fi in my car? I don't think so.

Third, technological change. What the merging parties are saying is, sometime in the future there's going to be a sufficient technological change so we can't exercise market power. If the deal makes sense for the merging monopoly today, it makes sense at that point in time. Let them do the deal then. Then we'll know consumers won't be harmed.

Finally, let me make two quick points about efficiencies. First, they are saying there are efficiencies in terms of people being able to share content. They share content today, they can share content in any fashion that they choose to right now.

Second, what Mr. Karmazin said was, "We are prepared to pass on some synergies in the form of lower prices." Focus on those words: "we are prepared to pass on some synergies." In a competitive market, they don't have a choice. In a competitive market, they have to pass on those synergies.

Competition is what drives XM and Sirius to offer better products and lower prices. If I'm a Sirius engineer and I invent the better mousetrap, the better radio tomorrow, they will introduce that product out on the market as quickly as possible. But if XM and Sirius is a monopoly, they can sit and figure out when it is they'd like to bring the product out to market.

Chairman KOHL. Senator Hatch?

Senator HATCH. Well, Mr. Karmazin, there are a few things I just don't know about this, and maybe I can ask what may be very stupid questions.

But as I understand it, the SEC has granted two licenses, one to Sirius and one to XM. Is that correct?

Mr. KARMAZIN. Yes, sir.

Senator HATCH. If you merge, will there still be an extra license available?

Mr. KARMAZIN. No, sir. But there's plenty of spectrum available. If the question is whether or not—

Senator HATCH. I guess my point is this. Let's assume that you merge and that you really become much more successful so that you quit losing the billions of dollars that have been spent. What keeps another satellite company from coming in and competing?

Mr. KARMAZIN. Well, I think the idea is that there is plenty of spectrum. There are plenty of competitors out there who have expressed an interest in doing the kind of content that satellite radio is doing.

Senator HATCH. You're saying that there's nothing that says others can't come in and compete with you.

Mr. KARMAZIN. That's correct. I'm saying that there's nothing that stops somebody from using the WCF spectrum or using any of the spectrum that the—

Senator HATCH. I presume that if this merger takes place and you become much more successful, let's say you get an audience of 50 million people combined, I assume that others would want to get into this business.

Mr. KARMAZIN. Well, I mean, that's definitely a possibility. But I will tell you that if in fact we are successful, it is because we have been successful in convincing people to pay for radio. You know, the majority of the people are satisfied with free over-the-air radio.

Senator HATCH. Well, I think the point I'm making is, you're not foreclosing the market from others coming in. You're just trying to make it a more efficient market so that both of you can survive, when you may not be able to survive if you don't combine.

Mr. KARMAZIN. Yes. I would like to think that we're going to survive, so I don't want to give that impression.

Senator HATCH. Yes. You would put it in different terms.

Mr. KARMAZIN. Yes. But I do feel that the reason that we are not offering lower prices for the consumer is because of our cost structure today. And I'm not talking about the cost structure of the content, I'm talking about the cost of our billions of dollars of infrastructure on satellites and the like, that this merger gives us the opportunity—not standing alone, this merger gives us the opportunity to, in fact, find cost savings that will enable us to reduce the price and, therefore, maybe enable us to get as many subscribers as you say we might be able to get.

Senator HATCH. Now, I share Senator Brownback's feelings about obscenity and pornography, but I also understand the problems that you have as people in the media. That is, unless the Supreme Court is going to define exactly what pornography and obscenity is, it's pretty tough for you to have to make that definition for them.

There is a right of free speech, even though I'd prefer not having those programs for our families. But I suspect that that's more of an analysis than has been given thus far. That is, it's pretty tough to define just what pornography and obscenity really is under current Supreme Court decisionmaking.

Mr. KARMAZIN. Senator Hatch, I was a broadcaster back in the old days when we had the seven dirty words, and it was very clear

that when you had the seven dirty words, no license that I was involved with ever used the seven dirty words.

Senator HATCH. If you had a definition here, you would abide by the definition, wouldn't you?

Mr. KARMAZIN. Exactly. When I was a broadcaster, subject to the indecency rules, all I said was, tell me what the speed limit is and I'll go by that speed limit. Tell me that it's 55 miles an hour and I'll follow it.

And I'm sort of troubled by the fact that the NAB, which used to be more interested in protecting those free rights, have gone the other way in saying that, instead of sitting there and saying, let's clarify the rules, they're saying, well, just make sure, as vague as they are, just subject satellite radio to them as compared to getting the Supreme Court, maybe, to make those rules clearer.

Senator HATCH. I see.

Mr. Balto, I was very impressed with your written testimony. Clearly, there is a strong argument that the regulatory agencies should view this transaction narrowly. But aren't we living in a new world and a far more dynamic economy?

Should we not look at the regulatory approval of Whirlpool/Maytag mergers as our guide to the future? Specifically, under a traditional analysis, the Department of Justice would have placed great reliance on the market share that the resulting appliance manufacturer would have enjoyed.

However, these are different times when globalization and the speed of commerce are rapidly changing markets. Therefore, the Department worked with the parties to the merger and developed a detailed market analysis. That analysis showed that the merger would not have an ill effect on competition since oversees competitors were quickly expanding their market share.

It also showed that appliance retailers could, and do, quickly change the appliance brands that they choose to carry in their stores, only further underlying the premise that a traditional market analysis might not be as effective in this situation.

Now, is this not similar to the XM and Sirius proposed merger in the sense that, though the guidelines support your argument that the market should be viewed narrowly, we are looking at a new market where satellite radio competes directly with terrestrial radio?

Mr. BALTO. I think that's a very good question.

Senator HATCH. It's a little long question.

Mr. BALTO. No. I appreciate the question. It's something that the antitrust enforcers and the antitrust courts always consider, the degree that the market is dynamic.

First, should there be foreign entry into satellite radio into the United States, that would be just terrific. I don't think that we're about to see French satellite radio enter into the United States.

But, more importantly, if you refer to my testimony, all of the technological changes that the parties are proposing are several years off in the future. I think it's important to see this as being a truly dynamic market, but I think that dynamism—Senator Hatch, I should caution us to weigh even more heavily on enforcement.

In the Office Depot/Staples merger, the parties said, look, there's all these new entrants who are about to come in and enter and transform our market. And you know what's happened 10 years later? None of those people entered, absolutely none.

But what's happened is, the number of superstores have increased from 1,000 to 3,000. If the court had allowed Office Depot and Staples to enter into a truce and create an office supply duopoly, then there would not have been anywhere near that level of increase in the number of stores.

I think that you should credit the success of these two companies and the new products they've invented. You should credit how aggressively they compete with each other. That competition has brought benefits to millions of consumers and, because of that, they should not be allowed to merge.

Senator HATCH. Ms. Sohn, I feel like we've been ignoring you. I don't want to leave you out of this. But as you know, customers are one of the critical sources that the Federal agencies use for defining a market. Now obviously they're the ones that know how and why they choose the products that they do.

Now, how do you believe that consumers will react to a change in the marketplace if this merger is ratified?

Ms. SOHN. Well, I just want to make it clear that Public Knowledge doesn't take a firm position on the antitrust issue. I mean, we really think there's a lot of information, private information, that we don't have access to that will really determine whether or not the other competition in the market—and while it may not be identical it's still competition—would really tamp down satellite radio prices.

Here's my concern. My concern really is with the hegemony of the broadcast industry. I remember, in 1992 when the FCC was starting to consider giving out, actually, at the time, four satellite radio slots.

The NAB approached my colleagues and me at the Media Access Project and talked about all the ways they'd like to regulate the satellite radio industry. So, you know, for the past 15 years the broadcast industry has been trying to limit what satellite radio can do, basically trying to put it out of existence. That really is my concern here.

We talked a little bit about the Direct TV–Echo Star merger which was disallowed. Sometimes I wonder, we didn't take a position on that then, but that merger was disallowed. Cable prices have still gone up. As a result, the DBS industry was not able to compete against companies like Verizon and others in the recent AWS spectrum auction.

My concern is whether, if you do not allow this merger, whether you're going to have two weak companies that cannot compete against a 70-, 80-year-old broadcast industry that has done everything in its power over the last 15 years to try to hobble or regulate the satellite radio industry.

Senator HATCH. I noticed in your written testimony that you state, "If the merger is ratified it should include provisions creating pricing choices, such as tiered programming." Now, does not this open the door to greater price increases? For example, would not the merged company charge extra for its NFL package?

Ms. SOHN. Well, that's why, also, one of the other conditions is a price freeze on the combined programming package for 3 years. Now, there was some question about whether the price freeze that Mr. Karmazin promised at the House Antitrust Task Force Committee hearing that I testified at as well would have just applied to the current package or the combined package, and we are now calling for a price freeze for 3 years for the combined package.

Senator HATCH. Mr. Chairman, if I could just make one comment. I know my time is up. This is an extremely interesting situation. You know, all of us here would like to please everybody. I, for one, believe that there ought to be competition.

On the other hand, you know, this question of obscenity and pornography, you know, I'm totally opposed to it. I think we have too much of that on our current air waves, and also on our current television sets.

But my point is, unless we have the guts to define it, and the Supreme Court has the ability to uphold the refinements that we make, it's pretty hard to say that—you know, that you can't put on what really is a free speech situation.

But, you know, I don't think it has much to do with this merger, but I would encourage Mr. Karmazin and others to kind of look at the interests of mankind as you go through this. You've indicated you certainly will; you're not going to do something that is outside of the law.

The question is, can you do some things that are inside the law that would be helpful to mankind? I would encourage you to do that. As far as I'm concerned, that's about all you can say about that issue, although there may be more.

But this is extremely interesting to me because I can see some ways where competition can exist. I can see a number of ways where people, Ms. Quass, are very concerned. But it's a long way to have this approved, anyway, and we'll just have to see what happens.

But I have a difficult time—and maybe, Mr. Balto, you might want to answer this—understanding why, if they are successful after this merger, there would not be plenty of competition that would arise, and plenty of desire on the part of Congress to make sure that competition flourishes.

That may be a question that should be asked only after we see what happens, but that's my own personal—I just cannot see why there wouldn't be a lot of competition here.

Now, I also have a difficult time seeing why terrestrial radio can't compete, or why it's not a competitor, even though it may be at a disadvantage, if people can afford to pay the 13 bucks a month, or whatever it is that you pay for satellite. This is an extremely interesting case. I think this has been an extremely good panel, so I want to compliment each of you for your comments here today.

Chairman KOHL. I want to get back to Senator Hatch's point, because it's central to this hearing and to this whole subject, the business of competitiveness.

Mr. Karmazin, of course, is an "expert" and he understands his business. So, I'm going to ask a question by making a statement. It's my understanding that the very high cost of launching a sat-

ellite, literally billions of dollars, would make it virtually impossible for another satellite radio company to enter the market.

Now, do you really believe entry by another satellite company is likely after this merger? And you people have thought about it. I'm sure you have a clear answer to that question.

Mr. KARMAZIN. I do have a clear answer to that question. You're asking whether I think there will be another satellite competitor, the answer will be, probably not.

But I do believe that there is other technology and there are other frequencies. I don't know what the magic is, whether you're getting the content from a satellite or you're getting the content from another kind of technology, but there is currently plenty and there will be even more competition in the future, probably not from another satellite company.

Chairman KOHL. That's a very important answer. I mean, that's a clear—I appreciate your being very clear in your response.

Senator HATCH. May I interrupt on that, Mr. Chairman?

Chairman KOHL. Go ahead, Senator Hatch.

Senator HATCH. Would it be similar competition? That's the point.

Mr. KARMAZIN. Yes.

Senator HATCH. In other words, whether it comes from satellite or not is not the issue. It's, would it be similar competition?

Mr. KARMAZIN. And that's what we have said, is that we believe that how you get the signal into the car, whether or not it would go by Wi-Fi or whether, it go by cell phone, or whether it go by terrestrial radio, or whether it goes by satellite—

Senator HATCH. Or some new technology.

Mr. KARMAZIN.—or some new technology, we think that's the relevant issue, not whether or not somebody happens to use very expensive satellites as compared to using some more efficient technology to get into the car.

Chairman KOHL. Yes. But what we are establishing here, at least in terms of opinion at this point, is that there is very little likelihood that there will be a satellite competitor to this merged company.

You're saying there can be others and we can talk, but Senator Hatch's question needs to be answered, at least to my satisfaction, and in a fairly precise way, which you are in a position to do, and you are doing it, which I respect. You are saying that there is not a likelihood that there will be a satellite competitor to your merger.

Mr. KARMAZIN. No.

Chairman KOHL. If you thought, in a very easy manner, all kinds of different technologies are available, will be available to make your service not unique at all because it can be duplicated and received in so many different ways, I don't think you'd be here today asking for this exclusivity, Mr. Karmazin.

Mr. KARMAZIN. Senator, I gave you a very candid, very honest answer, in my opinion. But, you know, this is America. If somebody wants to do it and they have the resources to do it, nothing would stop them from doing it.

Chairman KOHL. From doing what?

Mr. KARMAZIN. Launching another business competitive to satellite radio.

Chairman KOHL. But you would not expect it to be a satellite business?

Mr. KARMAZIN. I don't expect it. But you know what? I didn't expect that there was going to be audio channels coming from cell phones. I wasn't a visionary that invented the I-Pod. And by the way, I didn't invent satellite radio, you know.

So it was that there are all kinds of very smart people with all kinds of access to capital, and there is no stopping their ingenuity as to what business they want to get into. But do I think that's likely? No, I don't believe that's likely. That's as candid as I can be.

Chairman KOHL. I appreciate that. I do appreciate that.

Senator HATCH. Well, 5 years ago we didn't know what Wi-Fi was, you know. Or maybe it's longer than that, but I think about the last 5 years.

So you don't know what kind of technology is going to come. But on the other hand, you know, I can see the concerns of the others there as well. I personally don't believe that there will be a lack of competition if you're successful.

Mr. KARMAZIN. Yes. I didn't believe there was going to be an HD radio. I mean, I didn't believe, you know, that there was going to be—

Senator HATCH. I'm very interested that you were honest enough to say you didn't think anybody else would do satellite.

Mr. KARMAZIN. Well, you know, I made a lot of money in it.

Senator HATCH. I don't see how you know that. Because I know one thing, if you're really successful, there's going to be people with billions of dollars who are going to come in and compete with you, it's just that simple.

Mr. KARMAZIN. I just think that there's a lot of other technology and there are a lot of ways of getting the signal into the places where the consumer wants the signal, that you might be able to do it more efficiently than the high-cost way that we chose to do it 10 years ago, which was to start getting into satellite radio.

I mentioned earlier that the losses that the companies—again, not crying poverty by any means—have sustained are, combined, about \$7 billion before we've made a dime. So the likelihood of somebody going through those kinds of losses is, there's a more efficient way of doing it.

You know, I would not be the person who would launch the three satellites, have a ground station on the spare, put an infrastructure in, when I have all kinds of other technologies that are enabling me to get into the car, which everyone has said is the place where you want to be.

Senator HATCH. Well, to do exactly what you're doing now.

Mr. KARMAZIN. Right.

Senator HATCH. Except that it's not satellite.

Mr. KARMAZIN. Correct.

Senator HATCH. Yes. I see.

Chairman KOHL. Mr. Balto, we often hear the argument that the merged company could not raise its price because it competes with free over-the-air, yet we have a similar example that appears to be contrary to this argument that cable television competes with free over-the-air all over America in every market.

But every year, consumers in every market all over America see substantial price increases averaging sometimes triple the rate of inflation on their cable bill. Doesn't this teach us something that can be prophesied with respect to this merger versus over-the-air radio?

Mr. BALTO. I think that is absolutely correct. I am sure that the proponents of this merger will note that free TV is much smaller than free radio is, but I don't think, if you carefully look at what satellite radio does, you will conclude that it does compete directly and competes aggressively against terrestrial radio. So, I think you would have the same problem of likely price increases.

Let me touch on the technological innovation point that was just made. Look, the courts, interpreting the Clayton Act, have made it clear that we don't sacrifice the interests of consumers on a bet that the market will change.

To approve an otherwise anti-competitive merger, the merging parties must demonstrate that entry is timely, likely, and sufficient to prevent anti-competitive harm and it's a 2-year period used. I don't think you can show that those alternatives will come to the market within two years.

But in any case, if that's the key to their argument, if this deal makes sense now, it will make sense when those alternatives can constrain anti-competitor conduct.

Chairman KOHL. Ms. Sohn?

Ms. SOHN. I just have to disagree with Mr. Balto on the TV point, because a lot of the reason that people get cable TV in the first place—and frankly, the *raison d'être* for cable starting—was for people to get their local over-the-air stations. OK. That's different than here. OK.

People don't get XM radio because they want to get access to their local stations. They get it because they're tired of the play listing and the over-advertising on local stations. So, it really isn't comparable.

The other point is, I do think Mr. Balto understates a little bit the vastness of technological change. I don't know if I ever agree with Senator Hatch on much of anything, but I think on this one I probably lean more toward his argument.

In fact, I think it was last week a satellite radio—it doesn't do it exactly like XM and Sirius, but a service called Slacker that provides personalized channels, radio channels, using existing extra satellite capacity was just launched. They say that, by the end of the year, they're going to be able to have receivers in cars.

Now, obviously this is something that the antitrust authorities are going to have to look at to see if, indeed, this would tamp down prices. But I do think that Mr. Balto understates a little bit the rapidity of technological change and what is actually coming on over the horizon.

Chairman KOHL. I'll ask one more question, then I'm going to open it up for any comments you have before we close.

Mr. Karmazin, 2 days ago the Kansas City Star published a column entitled, "Sirius-XM Merger A Bad Idea". In the article it stated that if the Sirius-XM merger was allowed "Clear Channel" would start buying up 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, and there will be nothing standing in the way of a marriage of NBC and CBS.”

Mr. Karmazin, doesn't the author of this article have a point? If we allow one company to control all of satellite radio, why not allow one company to dominate over-the-air radio, another company to dominate cable television, and yet another company to own all the television networks, et cetera?

Won't allowing your merger establish some kind of a precedent that could easily lead to consolidation in many other areas of communication?

Mr. KARMAZIN. Senator, I have a great deal of respect for you and this Committee and the Justice Department and the FCC, and I don't think that because you allow one means you're under any obligation to do anything else. I think each of these markets stand on their own. I believe that there is not that risk.

I can also tell you that publications like the L.A. Times and USA Today and the Wall Street Journal and the Chicago Tribune have all taken the opposite point of view. So I don't want to get into dueling editorials, but I can assure you that there have been an awful lot of very respected publications who believe, as I do, that this merger is in the public interest.

Chairman KOHL. OK. Other comments? Ms. Quass?

Ms. QUASS. I would just say that none of us can sit here and predict the future. And while we all hope that the technology continues to advance both from over-the-air free radio and many other sources, whether it is I-Pod or whatever, but I think the concern that I wanted to just clarify before we leave today is, I want to make it clear that over-the-air local radio does not compete on a national platform with satellite radio. There are two competitors, XM and Sirius.

They are the only ones who have the bundle and offer the array of services on the platform that they have, that is mobile, that is nationwide. We need to be clear that if we're going to compete and we want to talk about competing on a level playing field, that we get on a level playing field. The national market is not it. We do not compete. The only competition is between those two. Thank you.

Chairman KOHL. Thank you.

Ms. Sohn?

Ms. SOHN. Yes. I want to agree with Mr. Karmazin. I'm not concerned about the slippery slope argument either, that if you grant this merger you'll have to grant every other one the digital space. I assume antitrust authorities judge each merger on its merits, so I don't buy that argument.

The second thing is, it was so interesting to hear Mr. Balto talk about how the broadcasters are talking consistent with the public interest. You know, you're the antitrust expert, I'm the communications expert. I've been doing this for 20 years. Let me tell you, they rarely do anything that's consistent with the public interest. OK. They're here because they haven't liked satellite radio from the get-go. Their idea of a level playing field is one that puts them at the top and everybody at the bottom.

I mean, you know, the broadcast industry has a history of going to government to protect it, must carry exemption from paying the performance fees, free spectrum. We can go on and on and on. So, be wary when you listen to the broadcasters about why they are opposing this merger. Just remember their history in trying to limit satellite radio from the get-go.

Chairman KOHL. Mr. Balto?

Mr. BALTO. I think the merger should be stopped. We only have access to public information, a point Gigi and I both made. But based on that public information, there are serious concerns raised.

I think it's crucial to understand there is a reason why 14 million people pay \$13 a month for this service. It's because satellite radio provides a valueable service, a service that is different than other alternatives. The courts consistently look to those characteristics to determine what a relevant market is. In this case, the relevant market is satellite radio.

Technological change. Antitrust enforcers and courts hear those arguments all the time. If they had been accepted, the Antitrust Division's case against Microsoft might have fallen to the wayside.

But the key thing here is, if that's true, this merger makes sense for these merging parties today, it will make sense the day consumers can receive a form of a cluster of services of radio in my car by Internet. It will still make sense then, then do the deal then. Otherwise, if you approve the merger as proposed, you're writing a check on your children and your grandchildren's behalf by agreeing to a monopoly that will last forever.

Chairman KOHL. Thank you.

Mr. Karmazin, do you want to make one last comment?

Mr. KARMAZIN. Sure. Thank you very much. I appreciate the opportunity to be here. I look forward to working with this committee, as well as the regulators, in demonstrating that this merger is not anti-competitive and in the consumers' best interests, and I look forward to everybody giving the broadcasters the level playing field they want so that they should pay for performance rights as well as spectrum, which is sort of what satellite radio is doing right now.

Chairman KOHL. Thank you.

Well, we thank you all for being here, both those in the audience, as well as those of you—and you've been really good—who have agreed to be here today and testify and make comments.

As Senator Hatch said and as we all understand, this is a big issue. It's something that is going to reverberate across our country no matter which way it goes, I think, particularly if we allow the merger, so let's see what happens.

Thank you, Mr. Karmazin. Thank you, guys.

[Whereupon, at 4:12 p.m. the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Senator Kohl's Follow-Up Questions for XM/Sirius HearingFor David Balto**Question:**

1. Isn't it true that, in order to be competitively significant under antitrust law, a competitor must be present in the market now or likely to enter in the next two years? If so, what is the reason for this two year time frame? What does this two year time frame mean for the competitive significance of internet radio?

Answer:

1. The purpose of the Clayton Act is to prevent mergers or acquisitions that may lead to a loss of competition that will harm consumers through higher prices, less service or less innovation. The case law makes clear that an otherwise anticompetitive merger may be permitted if entry into the market is so easy that such entry will be successful in preventing any anticompetitive effects of the merger. As the Merger Guidelines note "a merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger either collectively or unilaterally, could not profitably maintain a price increase above premerger levels."¹

Both the Merger Guidelines and the case law under the Clayton Act make it clear that for entry to be considered competitively sufficient a competitor must be present in a significant fashion within a two-year time period. As the Guidelines note "the Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact."²

The purpose of the two year period requirement is straightforward. Consumers should not suffer the competitive harm of a merger for a lengthy period of time. As a rule of thumb the Agencies have set that period at two years. It also reflects a certain unwillingness of the Agencies to engage in speculation about entry that is simply too distant in the future. Entry after a period of two or three years may be so speculative that an agency may be unwilling to rely on such entry.

The two year time period is important as the Agencies consider the competitive impact of the XM/Sirius merger. As my testimony emphasizes, simply because a firm is considered a competitor does not mean that it is a competitor in the relevant market under the antitrust laws. Only those firms which offer a competitive restraint, i.e., control the ability risk of the merged firm to increase prices, should be included in the relevant market.

¹ Merger Guidelines, § 3.0.

² Merger Guidelines, § 3.2

I believe the Agencies and this Subcommittee should be skeptical of the technological alternatives posed by XM/Sirius such as Internet radio. It seems doubtful any of these alternatives will have a significant presence in the next two years. However, whether they are considered as part of the relevant market depends upon whether they could exercise a restraint on the merged firm's ability to increase prices. I believe that these alternatives are insufficient to avert potential anticompetitive effects within the two-year period.

Question:

2. In 2002, the Justice Department filed suit to block the proposal for a merger between the only two satellite TV services, DIRECTV and Echostar. In its lawsuit to block the merger, the Justice Department asserted that -

“Echostar and [DIRECTV] compete on a broad array of price and quality characteristics, including programming pricing, programming packages, acquisition of channels, retail compensation, equipment pricing, installation pricing, . . . and targeted promotions. Competition between [DIRECTV] and Echostar has taken the form of measuring themselves against one another, looking to each other when making price and quality decisions, seeking to have a competitive advantage over each other . . . , and imitating competitive improvements that the other has initiated. Consumers have benefited from competition between the two that would be lost after the merger.”

Are the same aspects of competition the Justice Department identified as at risk in Echostar/DIRECTV also at risk with respect to the proposed merger between Sirius and XM? Should this merger be analyzed any differently?

Answer:

I believe that the Justice Department in FCC actions opposing the DIRECT TV and Echostar merger provides an excellent model to analyze in the competitive effects of the XM/Sirius merger. Like that merger I believe there is a strong likelihood that the XM/Sirius merger will lead to higher prices, less innovation and less choice.

As my testimony suggested, there are certain critical economic factors that serve as the basis for the satellite radio market -- many of those factors were present in the satellite television market. Moreover, one of the key arguments made by the parties in the XM-Sirius merger is that “they compete with free radio.” In the Echostar/DIRECTV merger satellite TV certainly competed with free TV, but that was insufficient to alleviate the competitive concerns of the DOJ and the FCC.

Question:

3. Would it be a benefit to consumers if there was only one satellite radio service, so that they could access all content from satellite radio now carried exclusively by either Sirius or XM, for example, major league baseball and pro football?

Answer:

Mergers may often lead to efficiencies including bringing together different products that rival firms offer. However, in the evaluation of efficiencies, the Agencies always consider whether efficiencies are merger specific, i.e., are there less anticompetitive means to achieve the same efficiencies?³

In the XM-Sirius merger there would be some benefit to consumers by merging together the programming of the two networks. However, it is clear that this type of efficiency is not merger specific. There is no reason why these forms of programming have to be offered on an exclusive basis and XM and Sirius could share this content. In other words, there is no reason why a merger is necessary to achieve the efficiencies of sharing content.

³ Merger Guidelines, § 4.0.



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Mel Karmazin
Chief Executive Officer

April 4, 2007

The Honorable Herb Kohl
United States Senate
330 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Kohl:

Thank you for the opportunity to discuss the proposed merger of Sirius and XM at the Senate Judiciary Committee, Antitrust Subcommittee hearing last month. I have attached to this letter answers to each of the follow-up questions you raised after the hearing.

As I explained in my testimony, this transaction will benefit consumers in substantial and concrete ways. Simply put, the new company will provide consumers with more choices and lower prices. Both Sirius and XM have made clear that no satellite radio consumer will have to pay more than the current monthly subscription price of \$12.95 as a result of the merger. Once interoperable radios become commercially available, those who want to have access to the complete offerings of both companies will be able to receive them on a single device for significantly less than the current price of \$25.90. We also are committed to bringing consumers the ability to get the best of each company's current program line-up at a price well below the cost of the two services today. And while no radio will become obsolete as a result of this transaction, we fully expect the merger to stimulate the development of new highly portable, low-cost, and user-friendly devices.

These are not just promises made to appease regulators; they also will make good business sense for Sirius-XM. But each of these important benefits is directly tied to the proposed merger and cannot be realized without it. Most fundamentally, the merger will ensure that satellite radio will remain a strong, effective, and innovative audio entertainment provider.

Today's audio entertainment market is robustly competitive and characterized by an ever-expanding multiplicity of choices. Satellite radio competes directly and intensely with a number of other audio providers for consumer attention. Indeed, in their SEC filings, radio broadcasters routinely point to a host of audio entertainment services, including satellite radio, as direct competitors to terrestrial radio. By the same token, Sirius and XM list a wide range of audio entertainment competitors, including AM/FM radio, in their SEC filings.

In the context of the ongoing media ownership proceeding at the FCC, the broadcast industry aptly has characterized the competitive state of the audio entertainment market. Just months ago, numerous broadcasters filed voluminous evidence with the agency to drive home the point that competition exists among all manner of audio providers, including AM/FM radio and satellite radio, as well as HD radio, Internet radio, iPods and other MP3 players, music



The Honorable Herb Kohl
 April 4, 2007
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subscription services, podcasting, and mobile phones. The latest illustration of this growing competition is reflected in the FCC's HD radio decision adopted at the end of last month. The decision will enable more stations to broadcast not only high quality audio entertainment, but also multiple streams of programming and data casting. Moreover, the decision to permit experimental digital subscription services will intensify the competition between AM/FM radio and satellite radio, not only for listeners but also for subscription dollars.

Now, however, some of the same parties that have portrayed the audio market as abundant and competitive in other contexts are attempting to cast doubt on the merits of a Sirius-XM merger by questioning whether satellite radio fully competes with AM/FM radio and other audio services. At the hearing, Ms. Quass, as a representative of the NAB, tried to make the case that satellite radio should be viewed as a market onto itself. Pointing to minor differences between various audio services, Ms. Quass claims that Sirius and XM are the sole participants in a market for "multichannel mobile audio services" and, therefore, that the proposed merger will create a "monopoly." Mr. Balto echoed this view in his testimony. Of course, this artificially narrow characterization conflicts with the expansive audio market that broadcasters publicly have described.

It is well-established in antitrust law that characterizing a product as "unique" is not sufficient to cabin it into its own market. A laundry list of distinctions between satellite radio and other audio programming alternatives does not make satellite radio a separate product market. Rather, the focus must be on the real-world competitive interplay among programming alternatives, particularly as they constrain the ability of satellite radio to raise prices.

It also is not the case that satellite radio must be considered a distinct market unless there are alternatives that offer *all* of the attributes of satellite radio in a *single* package. Mr. Balto repeatedly invoked the FTC's case against Staples/Office Depot at the hearing as the basis for his argument to the contrary. Mr. Balto neglected to mention, however, that the FTC reached the opposite conclusion eight years after Staples was decided. In approving the merger of Federated and Mays department stores, the FTC found that a combination of products that individually provided only a subset of services nonetheless were part of the relevant product market. Specialty stores were deemed to be in the same market as the department stores.

In the case of satellite radio, there can be no question that the availability of alternatives from a combination of sources limits what consumers are willing to pay for our services. In the five years that we have been in service, Sirius *never* has raised its prices. This is largely because music, sports, and talk content are available not only via satellite radio, but also on terrestrial radio, iPods, and Internet radio, among other sources. Because the importance of sports packages was raised at the hearing, I would like to reiterate that this content is available



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to consumers on other sources aside from satellite radio. For example, Major League Baseball offers the home and away radio feeds of every regular and postseason game through its GameDay package. Other sports leagues offer similar packages.

Given the realities of today's audio entertainment landscape, there is no legitimate basis for concern that this merger will enable the new company to charge "monopoly" prices or otherwise harm consumers or competitors. Although satellite radio has proven to be an appealing and popular new product, it accounts for only a small slice of the audio entertainment market. While XM and Sirius combined have approximately 14 million subscribers, this number pales in comparison to the approximately 230 million Americans that listen to AM/FM radio every week. Likewise, the number of satellite radio subscribers is dwarfed by the 180 million iPods that have been sold to date and the more than 200 million Americans that have access to Internet radio.

A combined Sirius-XM will continue to compete against a host of rivals, including broadcast radio, which is offered to consumers free of charge. The company's prices will continue to be constrained by this inescapable truth. And given that satellite radio accounts for only about 3 percent of all radio listening, we will have every incentive to offer prices that will attract more subscribers, not drive them away.

In addition, there was some discussion at the hearing about whether a combined Sirius/XM would be able to preclude new entry into the audio entertainment market. The answer clearly is no. There are a multitude of new audio entertainment services in the pipeline, and the merger of Sirius and XM will have no impact on these developments. Whether or not any future new entrants will be other "satellite radio" companies is irrelevant. There is nothing in antitrust law that says that new entry must occur via the same technology employed by existing market participants.

In sum, a satellite radio merger affirmatively and substantially will benefit consumers without causing competitive harms. I would welcome the opportunity to sit down with you in person to further discuss my answers to your questions, and any other matter of interest or concern to you as this process moves forward.

Sincerely,

A handwritten signature in black ink that reads "Met Karmazin". The signature is stylized and includes a circled "M" at the end.

Met Karmazin

Senator Kohl's Follow-Up Questions for XM/Sirius Hearing

For Mel Karmazin

1. During your testimony at our hearing, you promised not to raise your prices after the merger. You also made these promises at your earlier testimony at the House Judiciary and Commerce Committee. And when I met with XM Chairman Gary Parsons prior to our hearing, he made the same promise. But these promises were somewhat vague and not always consistent. I'd like you to be more specific and clarify what they mean.

(a) When you say you will not raise your price, what do you mean? Is the price you are referring to the \$12.95 that each satellite radio company currently charges consumers, or the \$26 dollars that it cost to get both services?

Following the merger, we will not raise either the \$12.95 that each satellite radio company currently charges consumers, or the \$26 dollars that it costs to get both services.

(b) What time period is your promise not to raise price good for?

We are prepared to discuss with the FCC and the antitrust authorities a substantial period in which we would agree not to raise prices.

(c) Are you willing to commit to these promises in the form of an enforceable FCC order or antitrust consent decree?

Yes. In addition, other alternatives available in the market (such as terrestrial radio, HD radio, Internet radio, and mobile phone offerings) will constrain the company's ability to increase prices.

2. In 2002, the Justice Department filed suit to block the proposal for a merger between the only two satellite TV services, DIRECTV and Echostar. In its lawsuit to block the merger, the Justice Department asserted that -

"Echostar and [DIRECTV] compete on a broad array of price and quality characteristics, including programming pricing, programming packages, acquisition of channels, retail compensation, equipment pricing, installation pricing, . . . and targeted promotions. Competition between [DIRECTV] and Echostar has taken the form of measuring themselves against one another, looking to each other when making price and quality decisions, seeking to have a competitive advantage over each other . . . , and imitating competitive improvements that the other has initiated. Consumers have benefited from competition between the two that would be lost after the merger."

Aren't the same aspects of competition the Justice Department identified as at risk in Echostar/DIRECTV also at risk with respect to your proposed merger between Sirius and XM? Why should this merger be analyzed any differently?

Each merger is decided by the DOJ based on the specific facts of the industry at issue. Multichannel video programming distribution ("MVPD") and audio programming are very separate industries. The DirecTV/EchoStar merger has little relevance to an investigation of the current merger.

There are some obvious and significant differences in the two industries. To take just one example, in DirecTV/EchoStar, across the vast majority of the country, there was at most one other MVPD provider besides the two satellite companies, and in rural areas there was no other competitor. In contrast, there are numerous competitors from which customers today receive audio programming including terrestrial radio, HD radio, Internet radio, music subscription services, iPods and other MP3 players, CD players, and cell phones. These other alternatives constrain the satellite companies because relatively few people today purchase satellite radio (particularly relative to the number of people who purchased MVPD services), and satellite radio competes to get its subscribers away from these alternatives, most of which are much more popular than satellite radio.

3. You have argued that satellite radio competes with digital music players (commonly known as MP3 players) such as the I-Pod. Are I-Pods and similar MP3 players an adequate substitute for satellite radio? In answering this question, please include in your answer specific responses to the following questions –

(a) Considering it costs about a dollar a song to obtain content for an I-Pod, how much would it cost a consumer to duplicate the musical content available on either Sirius or XM?

Consumers do not load their iPods solely with songs downloaded through iTunes. They can and do (legally) load iPods with their own existing music library or with free content that is available (such as podcasts).

Comparing the supposed cost of filling an iPod with satellite radio is a false comparison and misleading if the point being made is about the relative attractiveness of these products to customers. The numbers are clear. Over 100 million iPods have been sold. In comparison, there are only 14 million satellite radio subscribers.

(b) Are live sports broadcasts or news broadcasts available on an I-Pod?

A virtually limitless supply of regional, national, and international sports and news broadcasts are available for MP3 players, such as iPods, in the form of podcasts. Podcasting software and websites allow listeners to download audio shows for free, play them on computers and digital-music players when they want, and subscribe to updates.

In addition to the ability to manually download individual news or sports podcasts of interest, users can either subscribe to a news or sports podcast series from podcast directory software or websites (such as iTunes, Yahoo! Podcasts, Podcast.net, Podcast.com, and PodcastAlley.com; or directly from the news or sports website of interest (such as CNN, available at <http://www.cnn.com/services/podcasting/>). When subscribing to a podcast, users automatically receive up-to-the-minute news and sports broadcasts directly to their computer, and can transfer them to their portable MP3 players.

Podcasting is a rapidly developing and evolving area. Today alone, subscribers to CNN's podcasting service, for example, can automatically receive hourly and daily broadcasts. Other examples of news organizations that offer podcast subscription services are ABC News and NBC News. ABC News offers podcast versions of "Good Morning America," "Nightline" and other programs via ABC News.com. NBC podcasts hourly news updates which include highlights from prime time shows, including MSNBC's "Hardball with Chris Matthews" and "Countdown with Keith Olbermann."

Below is a list containing just a few of the many currently available sources for news and sports podcasts. A subscription to most of these services is free.

NEWS

<http://abcnews.go.com/Technology/Podcasting/>
<http://www.cnn.com/services/podcasting/>
<http://www.nbc5.com/podcast/index.html>
http://www.npr.org/rss/podcast/podcast_directory.php
<http://www.voanews.com/english/podcasts.cfm>
<http://news.bbc.co.uk/1/hi/programmes/4977678.stm>
http://www.cbsnews.com/stories/2005/09/08/podcast_60min/main828230.shtml
<http://www.nytimes.com/ref/multimedia/podcasts.html>

SPORTS

<http://espnradio.espn.go.com/espnradio/podcast/index>
<http://www.thesportspod.com/>
http://www.podcastalley.com/podcast_genres.php?pod_genre_id=2
<http://www.podcastdirectory.com/genre/sports/>
<http://www.nbc5.com/sports/5470670/detail.html>
<http://collegesportspodcasts.com/>
<http://www.podcastpickle.com/sections/29/1/>

As a more general antitrust matter, pointing out distinctions between satellite radio and other alternatives for audio programming is not the same as proving that satellite radio is a

separate relevant market. If these differentiating factors do not allow satellite radio to raise prices to the satellite base, they are largely irrelevant in determining the proper product market and whether the merger would cause anticompetitive effects. In fact, not every differentiated product is its own market. For example, XM and Sirius are themselves differentiated in having different content, so if the existence of differentiation was sufficient to establish a market definition, the two services themselves each would be in separate markets.

In addition, it is also not the case that satellite radio service must be a market unless consumers can find all of the characteristics of satellite radio in a single alternative. The FTC, in examining the merger of Federated and Mays department stores, noted that a combination of sources that individually only provided a subset (e.g., a specialty store) of what was provided by a different format (e.g., a department store) could be in the same product market. The FTC said there: "In summary, we do not believe that the product market in this matter realistically could be limited to conventional department stores. Based on the evidence gathered in this investigation, the Commission has concluded that the product market must be defined to include, at the very least, all department stores and all specialty stores that collectively sell substantially similar products to those offered by Federated and May." (Statement of FTC in Federated/Mays, 2005)

Moreover, pointing out satellite radio's supposed advantages over other formats for audio programming paints a picture that is misleading as to satellite radio's actual position in the marketplace. Terrestrial radio has over 230 million listeners. Over 100 million iPods have been sold. Over 200 million Americans have access to Internet radio. These numbers dwarf the 14 million subscribers to satellite radio.

4. Please identify all devices available today installed in cars to listen to internet radio while traveling in an automobile.

Internet radio is available today in vehicles, and this trend is expected to grow rapidly. PCs with Internet connections are now being installed in cars, boats, and other vehicles. These PCs currently connect to the Internet through regular cellular phone signals, but industry participants expect the in-car systems to eventually move to WiMax in the near future.

Recent examples of in-car PCs are:

- *Autonet Mobile.* Autonet Mobile has reached an agreement with Avis Rent A Car System to provide a rolling Wi-Fi hotspot to Avis customers called Avis Connect. With Avis Connect, Avis will issue motorists a notebook-size portable device that plugs into a car's power supply and delivers a high-speed Internet connection. Autonet Mobile will also be available for purchase in late Spring 2007. (<http://www.goautonet.com/wp/>;)
- *Ford Motor.* F-Series pickups can now be equipped with FordLink, which went on sale in September 2006. The PC, which runs Microsoft's XP software on an Azentek computer, can play Internet radio and MP3 music files. (http://media.ford.com/newsroom/release_display.cfm?release=24161)
- *KVH Industries.* The TracNet 100 system, introduced in September 2006, displays Internet webpages on a vehicle's navigation and video screens and creates a

wireless connection in the car. The system operates on Verizon Wireless' high-speed network. (<http://www.kvh.com/Products/product.asp?id=123>; http://www.usatoday.com/money/autos/2006-10-31-auto-pcs-usat_x.htm)

- *Microsoft and Azentek.* Microsoft, working with hardware maker Azentek, will offer consumers a choice of two small PCs in 2008. One is a small portable model that can be carried around and temporarily popped into the dash where the stereo is located. The other, a more powerful model, is installed in the dash. Azentek currently offers larger computers for cars with built-in WLAN antenna, GPS, or bluetooth. (<http://www.azentek.com/webpages/products.html>; http://www.usatoday.com/money/autos/2006-10-31-auto-pcs-usat_x.htm)
- *Mini-box:* The VoomPC in-car computer system, reintroduced in January 2007, can use any operating system and offers vehicle manufacturers the ability to integrate a GPS navigation, communication, entertainment, and WiFi/GPS connectivity capability into private cars. <http://www.mini-box.com/site/index.html>
- *Slacker:* The Slacker Portable Player, an iPod-like device scheduled for a summer 2007 release, allows users to listen to multiple pre-loaded internet radio stations away from their computers. Users who install the Slacker Car Kit, a dock and antenna, can retrieve updates of new music for the Players' radio stations while driving. While connected to the internet via the antenna, the Player stores new music so there is continuous play. (<http://www.slacker.com/products.html>; <http://blogs.pcworld.com/techlog/archives/003878.html>)
- *InFusion:* InFusion, a portable music player first introduced in 2005, uses a technology called iRoamer to provide users with a portable Internet radio connection. Providing access to streaming media content (e.g. radio, music) via Wi-Fi internet access points, InFusion allows users to tune into any internet available radio station without the need of a PC. The InFusion player also includes the ability to record streaming content, removable storage to provide a multi-format MP3 player, and an FM receiver. The product finished in the top three products of the "Audio to go" category at the 2005 International Consumer Electronics Show. (<http://www.greyinnovation.com/Newssection/InFusion.htm>; <http://www.torianwireless.com/products/InFusionSpecSheet.pdf>)

5. Please provide your best estimate of the number of people who today listen to wireless internet radio while traveling in an automobile.

Currently, Sirius does not have any information regarding the number of people who listen to wireless internet radio while traveling in an automobile.

6. When evaluating the impact of the entry of new competition in evaluating the competitive effects of a merger, in order for the new competition to be considered competitively significant for the purposes of antitrust analysis, it must be "timely" – that is, likely to be accomplished within two years. This principle is stated in the Department of Justice/Federal Trade Commission Horizontal Merger Guidelines, section 3.2 ("the agency

will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact") and also the March 2006 Justice Department/FTC Commentary to the Horizontal Merger Guidelines.

(a) Has Sirius argued, or does it plan to argue, that the Justice Department should not follow this two year time frame in analyzing the competitive effects of new entry with respect to the Sirius/XM merger? If so, please cite the legal authority on which Sirius intends to rely.

Sirius' and XM's arguments about why this merger does not result in anticompetitive effects do not rest on entry outside a two-year period. The alternatives to satellite radio such as terrestrial radio, HD radio, internet radio, MP3 players, and audio programming through mobile phones are already in the market today.

As a point of antitrust policy, entry after the two year period plays a part in the competitive effects analysis of the merger. The prospect of entry outside the two-year period could deter anti-competitive conduct during the initial time period because anticompetitive conduct, by making higher profits available and/or because of the customer dissatisfaction that would be caused, would further encourage the entry of the future product. This effect could serve to constrain market power today and if so, it should not be ignored by the agency, nor is it in fact ignored. In recent DOJ testimony before the Antitrust Modernization Commission, DOJ noted there is "flexibility" with the two-year period, and in certain cases, "entry occurring beyond two years might nonetheless effectively deter or counteract the adverse competitive effects of the proposed merger, and we have been and are willing to consider this in appropriate cases." (Statement of James J. O'Connell on Behalf of the United States Department of Justice, Antitrust Modernization Commission, November 8, 2005).

(b) Does Sirius contend that there are reasons unique to the market affected by this merger so that entry by new forms of competition which is likely to occur more than two years after the Sirius/XM merger is competitively significant? If so, please explain why.

As noted in our response to (a) of this question, the alternatives to satellite radio such as terrestrial radio, HD radio, internet radio, MP3 players, and audio programming through mobile phones are already in the market today and Sirius is not relying on competition outside the two-year period to prove that anticompetitive effects will not occur.

Mary Quass
President and CEO, NRG Media
On behalf of the National Association of Broadcasters

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
March 20, 2007

Follow-up Questions from Senator Kohl:

1. If FCC rules limiting radio station ownership to 8 stations in the largest markets were eliminated, would you still oppose the Sirius / XM merger? If so, please explain why.

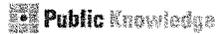
Complete elimination of the FCC ownership rules is very unlikely. And even with a modest relaxation of the ownership limitations, radio stations still would not compete against Sirius and XM in their national platform. Presently, both Sirius and XM can each bring over 150 channels into local radio markets. A combined satellite monopoly gives them an even more overwhelming presence in the local market. No local broadcaster will ever obtain enough spectrum, with or without an ownership rule change, to provide that much programming in local markets.

NRG Media has local radio stations in small to medium sized markets. We are confined by our FCC-defined market and geographic reach. With any potential change in local ownership rules, we would still be limited by markets and would remain unable to replicate their national, multi-channel service.

2. Does the development of new technologies like HD radio lessen the threat terrestrial radio stations believe would result from the Sirius / XM merger?

No, it does not. HD Radio is still at its inception. While we are very encouraged about the ongoing rollout of HD Radio in many markets across the country, we still have work to do with manufacturer and consumer penetration.

Hopefully, the future will see a great variety of products available to consumers within each digital platform. Notwithstanding that, it does not lessen the threat of a Sirius / XM monopoly. Like analog radio, HD Radio will remain constrained by market definition and geographic reach - unable to compete in the national, satellite radio market. A satellite radio monopoly allows them a great and unfair advantage to cross-subsidize products and set monopolistic prices for devices.



April 10, 2007

Senator Herb Kohl
 United States Senate
 Subcommittee on Antitrust, Competition Policy, and Consumer Rights
 308 Hart Senate Office Building
 Washington, D.C. 20510

Dear Senator Kohl:

Thank you for your questions and for the opportunity to supplement my testimony on the XM-Sirius merger. I hope that my testimony and my responses here will assist you and the Subcommittee in your investigation of the XM-Sirius merger.

1. At the hearing, you stated you could support the merger if it was conditioned on an enforceable three year price freeze on the prices the combined Sirius/XM could offer after the merger. Why did you choose three years rather than some other time period? Wouldn't allowing the merger subject to such a three year price freeze still leave consumers at risk of price increases after the initial three year period?

First, let me clarify that my suggested three-year price freeze and my other recommended merger conditions would only occur if the antitrust authorities find that there are existing competitors, or likely new entrants in the market that would constrain the new combined entity's prices. If the authorities do not come to such a conclusion, then we would agree that the merger should be denied.

However, if the antitrust authorities do find a broader market, then a three-year period will give developing technologies enough time to become even more compelling competitors to satellite radio, thereby ensuring that prices remain low.

Typically, the antitrust authorities judge potential market entrants by whether or not they will be able to have a market impact within two years of being introduced. I chose a three-year period to provide an even longer time frame for emerging technologies to enter the market, though other time frames might also be appropriate.

I believe that currently developing technologies such as portable music players, mobile Internet services, interactive radio services, and digital broadcast radio will develop significantly in the next three years. At the speed at which technology develops, three years also appears to be a sufficient time frame for entirely new, unanticipated technologies and competitors to develop. For example, a new company called Slacker only recently announced that it would, in the next year, offer a new mobile satellite radio

service.¹ I find it likely that new other new developments will continue to supplement the growing market in audio content delivery over the next three years.

2. In 2002, the Justice Department filed suit to block the proposal for a merger between the only two satellite TV services, DIRECTV and Echostar. In its lawsuit to block the merger, the Justice Department asserted that-

“Echostar and [DIRECTV] compete on a broad array of price and quality characteristics, including programming pricing, programming packages, acquisition of channels, retail compensation, equipment pricing, installation pricing, . . . and targeted promotions. Competition between [DIRECTV] and Echostar has taken the form of measuring themselves against one another, looking to each other when making price and quality decisions, seeking to have a competitive advantage over each other . . . , and imitating competitive improvements that the other has initiated. Consumers have benefited from competition between the two that would be lost after the merger.”

Aren't the same aspects of competition the Justice Department identified as at risk in Echostar/DIRECTV also at risk with respect to the proposed merger between Sirius and XM? Why should this merger be analyzed any differently?

There are several important differences between the inquiry into the Echostar/DirecTV merger and this one. Not only is the market for multi-channel video programming very different from the market for audio programming, but the options available to consumers have also changed dramatically since 2002. With telephone companies and webcasters providing multichannel video services, I am not certain that the Echostar/DirecTV merger would be denied today.

Second, it could be fairly argued that denying the Echostar/DirecTV merger did not benefit consumers. Supporters of that merger, including several of the public interest groups opposing the merger here,² argued that one strong satellite TV company would provide better competition to incumbent cable than two weak companies. However, at the behest of News Corporation, which sought to purchase DirecTV, the merger was denied. As a result, cable prices have continued to go up, and two separate, weak DBS companies lack the capacity to provide a competitive broadband service, which is essential to compete with cable. Nor did the DBS companies have the resources to bid successfully for new Advanced Wireless Services spectrum, which might have given them adequate broadband capacity.

¹ See, e.g., Erica Ogg, *Slacker's New Wavelength for Satellite Radio*, CNET NEWS.COM, Mar. 13, 2007, http://news.com.com/Slackers+new+wavelength+for+satellite+radio/2100-1041_3-6166934.html.

² Comments of Consumers Union, the Consumer Federation of America, and the Media Access Project, *In the Matter of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, before the Federal Communications Commission, CS Docket No. 01-348, Feb. 4, 2002, available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513075551.

I see parallels to the DBS merger here – one strong satellite radio company will be able to push radio broadcasters to provide better, more diverse programming and fewer commercials, particularly as broadcasters provide multiple HD radio streams. This competition could be even stronger if satellite radio providers are permitted to do more local programming, which they are currently prohibited from providing, except in narrow circumstances. But two weak companies are unlikely to provide any competitive or political pressure on broadcasters.

3. Sirius and XM argue that satellite radio competes with over the air radio, and that they could not raise prices to consumers after the merger because over the air radio is free. However, critics point out that over the air radio has many differences from satellite radio. Satellite has much more diverse programming; it is a mobile national service; the quality of its signal is much better; and it is largely commercial free. Additionally, satellite radio is unique in that it aggregates demand so that programming that wouldn't be economically feasible in one city is possible when placed on a national service.

What is your view of the significance of these differences between satellite radio and over the air radio? Do you think these differences make satellite radio a different product from conventional over the air radio?

There certainly are differences between over-the-air and satellite radio services. However, these differences are less a matter of the inherent characteristics of a particular service than they are a way for the services to differentiate themselves for competitive reasons. For example, take the fact that the music channels on XM and Sirius do not air commercials. Nothing about satellite radio service or the technology requires those channels to be commercial-free, and indeed when the two services launched in 2001, many of their music stations **did** play commercials. But the services ultimately decided that they could compete better with over-the-air broadcasting if their music services were commercial-free. This commercial-free service has, in turn, caused at least one large broadcast radio owner to limit the number of commercials it plays every hour.³

Similarly, there is nothing inherently subscription-based about satellite radio. Indeed, one of the early applicants for an S-DARS license proposed being free and advertiser supported. And digital “HD” radio makes it possible for radio broadcasters to charge subscription fees, and indeed, some are considering that alternative.⁴

³ See Clear Channel, “*Less is More*” *Success Continues on All Fronts*, Press Release, May 17, 2005, <http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1122>; Jack Myers, *Clear Channel's Hogan Responds to Karmazin: "Commercial Free and Subscription Free is Powerful Answer to Satellite Radio"*, Mar. 31, 2006, <http://www.mediavillage.com/jmr/2006/03/31/jmr-03-31-06/>.

⁴ I disagree with the characterization of satellite radio's signal as “much better” than over-the-air radio. It certainly may be better than AM, which doesn't play much music in any event, but it is not “much” better than an FM signal. In any event, any small distinction in quality will be erased once more over-the-air stations embrace digital HD radio, which they intend to do over the next several years. See Myers, *supra* note 3; HDRadio.com, *Find a Station in Your Area*, http://www.hdradio.com/find_an_hd_digital_radio_station.php (showing, e.g., 33 stations in Wisconsin, with more expected).

I think it is an overstatement to say that satellite radio is “unique in that it aggregates demand so that programming that wouldn’t be economically feasible in one city is possible when placed on a national service.” Broadcast radio can, and does, aggregate scattered demand, with large radio groups broadcasting network or syndicated programs across the country. For example, the largest radio groups command hundreds of stations across the country, and can thus aggregate demand among the different stations they own in each market.⁵

Digital radio, or HD radio, will also compete in providing high-quality audio programming with a wider diversity of content, given the more efficient use of bandwidth. This will allow broadcasting of more niche content, and further aggregation of demand.

Finally, it is important to note that whether or not satellite radio is “different” from over-the-air radio is not the deciding factor in defining whether the products are in the same market. Instead, the relevant question is whether consumers will listen to some other form of audio programming if satellite radio raises prices. Some satellite consumers may well move to broadcast radio, if they are primarily interested in receiving DJ-programmed music or live sports or talk content. Meanwhile, another set of current satellite customers, interested in niche music or programming, may choose to listen to Internet radio, podcasts or other types of recorded content. Such options also have the benefit of a clear signal and lack of advertising.

Nevertheless, these are merely my anecdotal predictions of possible consumer behavior. An authoritative study of how consumers will react to price increases is something that the antitrust authorities will undertake, and if those data show that consumers will not migrate to other platforms, then I would agree that the differences between satellite radio and other forms of audio programming do place them in different product markets.

4. Sirius and XM contend that we should consider new technologies like the I-POD and wireless internet radio in evaluating this merger. But these new technologies all have significant impediments to their ability to compete with satellite radio.

(a) Are I-Pods and other MP3 players properly considered a part of the same market as satellite radio when one considers that it costs about a dollar a song to put music on an I-POD, making using an I-POD to duplicate satellite radio is very expensive? And what is the significance of the fact that little of satellite radio’s non-musical content like live sports broadcasts or entertainment programming like Oprah Winfrey or Howard Stern is available for download to an I-POD?

⁵ As of the end of 2005, Clear Channel owned 1,184 radio stations across the country; Cumulus Broadcasting owned 300; Citadel Broadcasting 223, and CBS Radio 179. Project for Excellence in Journalism, *Radio Ownership*, THE STATE OF THE NEWS MEDIA 2007, at http://www.stateofthenewsmedia.com/2007/narrative_radio_ownership.asp?cat=4&media=9.

iPods and other digital music players can be loaded with content from a wide variety of sources, not merely tracks purchased from online stores. In fact, the vast majority of songs on iPods come from other sources,⁶ such as users' CD collections and freely available podcasts. Roughly 22 songs per iPod have been downloaded from the iTunes store, whereas a 30 gigabyte iPod can hold about 7,500 songs.⁷

Music gathered from users' CDs costs a user nothing more than the price they have already paid for their music. Many emerging artists also provide free digital downloads of their own music from their websites, meaning that consumers can even populate their digital music players for free.

Podcasts—downloadable, digital audio programming—are a significant source of material for digital players. The majority of podcasts are non-music programming, providing news, entertainment, and information to their listeners. These programs, many with hundreds of thousands of subscribers, range from those produced and uploaded by traditional broadcasters⁸ to exclusive audio content produced by news outlets and magazines⁹ to independent programs¹⁰ developed by amateurs that enjoy massive followings.¹¹

Again, like broadcast radio, digital music players will not be an identical substitute for satellite radio. However, the variety, quality, and value of downloadable content is not to be underestimated, and the salient question is whether or not consumers will actually turn to these alternatives in significant numbers in response to a price increase.

⁶ See, e.g., Alex Mindlin, *DRILLING DOWN; Sales of iPods and iTunes Not Much in Sync*, N.Y. TIMES, Dec. 11, 2006, available at

<http://query.nytimes.com/gst/fullpage.html?res=9E01E2DB1431F932A25751C1A9609C8B63>.

⁷ *Id.*; Apple, *iPod Specifications*, <http://www.apple.com/ipod/specs.html>.

⁸ Examples include an extremely wide variety of NPR programming NPR, *Podcast Directory*, http://www.npr.org/rss/podcast/podcast_directory.php; programming from each of the major television networks and cable news networks; and programming from radio groups like Clear Channel Communications. Mark Mays, *Remarks at the Progress and Freedom Foundation*, <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1233> (noting that Clear Channel programs are among the top downloaded podcasts on iTunes).

⁹ Washington Post, *Audio and Video Podcasts*, <http://www.washingtonpost.com/wp-srv/mmedia/podcastfront.htm>; New York Times, *Podcasts*, <http://www.nytimes.com/ref/multimedia/podcasts.html>; Wall Street Journal, *Wall Street Journal Podcasts* <http://online.wsj.com/public/page/audio.html?>; Newsweek, *Newsweek Podcasts*, <http://www.msnbc.msn.com/id/7078547/site/newsweek/>; New Scientist, *SciPod*, <http://www.newscientist.com/podcast.ns>; Fidelity Investments, *Fidelity Podcasting Episodes*, <http://podcasting.fidelitylabs.com/retail/episodes.php?regionID=RETAIL&progID=Fidelity%20Personal%20Finance%20Podcast;>

¹⁰ This Week in Tech, <http://www.twit.tv/TWiT>; This Week in Media, <http://thisweekinmedia.libsyn.com/>; DL.TV <http://dl.tv/>; The MacCast, <http://www.maccast.com/category/podcast/>; Rules for the Revolution, <http://www.rulesfortherevolution.com/>; WallStrip <http://www.wallstrip.com/theshow/>; The Lost Podcast with Jay and Jack, <http://www.jayandjack.com/>.

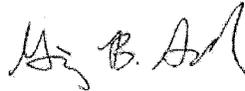
¹¹ For an example of the number of downloads per podcast, see Leo Laporte, *Bad Dog, No Guinness*, TWIT.TV, Feb. 13, 2006, <http://www.twit.tv/node/4150> (400,000 downloads of an episode of the Ricky Gervais Show; nearly 300,000 downloads for an episode of This Week in Technology).

(b) Is wireless internet properly considered part of the same market as satellite radio when one considers the fact that much of radio listening is done in cars, but devices to listen to wireless internet radio in cars are not widely available today? Are these devices, as well as WIMAX services that reach large distances likely to be available to consumers in the next two years?

As discussed at page five of my testimony, a number of wireless services are provided currently over mobile phone networks. These networks have extensive coverage and can be linked to car stereo systems. Also, the Slacker Internet radio service which I described earlier is expected to start selling a car receiver this Christmas. While few (and especially not I) can accurately predict the development of new technologies, all indications are that these types of wireless Internet radio services will become more widespread over the next several years. However, I cannot predict with any accuracy as to whether they will be available to consumers within the two-year time frame contemplated by antitrust law.

Thank you again for the opportunity to respond to your questions, and I would be happy to provide you with any additional information you require.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gigi B. Sohn". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Gigi B. Sohn
President

SUBMISSIONS FOR THE RECORD

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 Department of Justice 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 Staples/Office Depot, British American Tobacco/American Tobacco, Heinz/Beech-Nut, BP/Arco, Nippon Sanso/Semi-Gas, UPM Kymmene/Mactac, 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.

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.

- 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, antitrust 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 effects, 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 is 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 interruption. 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 hundreds of exclusive live interviews and performances you won't hear anywhere else and produce many interesting and engaging live talk shows in our national broadcast studios.²

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.** Satellite 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

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.

programming formats: news/talk/sports, 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.”
- **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 Stern 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 Staples/Office 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 Depot. . . . 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 Staples/Office 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 forms 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 complements. 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 (CBS/American Radio Systems (DOJ 1998))
- Movie theatres (Marquee Holdings/LCE Holdings (DOJ 2005))
- Multichannel video program distribution (Direct TV/Echostar (DOJ 2002))
- Local daily newspapers (McClatchy/Knight Ridder (DOJ 2006))
- Alternative weekly newspapers (Village Voice/NT 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 Effects³

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

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.

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 of 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 XM and Sirius we see them primarily responding to each other.

The Justice Department action against the DirecTV/EchoStar 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 than 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 sophistication of satellite radio receivers, led 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 XM-Sirius 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

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).

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 post-merger 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 not 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 permit 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 Prof’l 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 consumers.⁵

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 lesson 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.

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⁵ Richard Parker and David Balto, "The Merger Wave: Trends in Merger Enforcement and Litigation" 55 *Business Lawyer* 351 (November 1999).

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STATEMENT

Submitted on behalf of

**Common Cause
Consumers Union
The Consumer Federation of America
Free Press
Media Access Project
Prometheus Radio Project**

regarding

**“The XM-Sirius Merger:
Monopoly or Competition from New Technologies”**

before the

**Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

March 20, 2007

Common Cause,¹ Consumers Union (CU),² Consumer Federation of America (CFA),³ Free Press (FP),⁴ the Media Access Project⁵ and the Prometheus Radio Project⁶ urge the Congress, the Federal Communications Commission and anti-trust authorities to hold the line against the growing threat to an increasingly homogenized and concentrated media sector: mergers that concentrate ownership in too few hands. The XM-Sirius Radio merger exacerbates long-standing concerns regarding excessive concentration in the media market and its effects on programmer access and consumer choice. But concerns regarding this merger extend beyond general media consolidation concerns: based on the evidence available today, the proposed transaction is a merger to monopoly in a distinct product market that threatens to increase consumer costs and reduce competition and choice.

The proposed merger of the only two satellite subscription radio companies should raise a red flag for both antitrust officials and communications regulators whose job is to promote competition and consumer choice in the marketplace. Not only were XM and Sirius prohibited from merging as a condition of getting their licenses to use the public airwaves to deliver their services, but also, as demonstrated by the enormous growth of satellite subscription radio service at very substantial monthly charges and consumer equipment costs over just a few years, this service is, in fact, a distinct product and could develop into a vibrant competitive market. We believe the companies who seek to merge so soon after they

¹ Common Cause is a nonpartisan nonprofit advocacy organization founded in 1970 by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Now with nearly 300,000 members and supporters and 36 state organizations, Common Cause remains committed to honest, open and accountable government, as well as encouraging citizen participation in democracy.

² 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.

³ 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 and cooperative organizations, with more than 50 million individual members.

⁴ 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.

⁵ Media Access Project (MAP) is a thirty five year old non-profit tax exempt public interest media and telecommunications law firm which promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow.

⁶ The Prometheus Radio Project is a non-profit organization founded by a small group of radio activists in 1998. Prometheus Radio Project believes that a free, diverse, and democratic media is critical to the political and cultural health of our nation, yet sees unprecedented levels of consolidation, homogenization, and restriction in the media landscape. The project works toward a future characterized by easy access to media outlets and a broad, exciting selection of cultural and informative media resources.

began competing and offering consumers innovative new services; so soon after they demonstrated that subscription radio is attractive to consumers and could be much more so with consumer-friendly pricing; and in total disregard of the licensing conditions they accepted in order to use public resources, carry an enormous burden to demonstrate why public officials should abandon all normal rules associated with competitive markets and spectrum licensing to allow this merger.

To date, the public has been given no evidence that would support such a showing. Therefore, the Department of Justice (DOJ) and Federal Communications Commission (FCC) should reject this merger unless and until XM and Sirius present clear-cut facts demonstrating how consumers will benefit from less satellite radio competition.

This merger raises the most fundamental issues in antitrust law and poses a substantial threat to consumers and competition. In order to exercise their responsibility under the competition laws, the federal agencies must start from the assumption that the XM-Sirius merger is a merger to monopoly — a merger between the only two firms in the market for national subscription radio service. The product and geographic market characteristics of satellite radio are easily identifiable and quite distinct from other mobile and stationary audio products. It is national, mobile, programmed radio entertainment. The two services deliver and require consumers to purchase huge bundles of well over 100 channels. There are two, and only two, entities providing such a service. The alternatives the companies suggest are substitutes do not possess this set of characteristics and, therefore, cannot be said to compete directly with the service. Entry into this market is restricted by the need to have a license to broadcast at frequencies that enable the service to be provided nationwide. Consumer switching costs are substantial. The original licenses were issued under strict conditions that the two entities are not allowed to merge. There is no circumstance more disturbing from the point of view of the antitrust laws and the Communications Act than a merger within a distinct product market that takes the number of competitors from two to one. Merger to monopoly is antithetical to the competition laws, perhaps the worst offense against the basic principle that competition is the consumer's best friend.

XM and Sirius offer a number of arguments in support of their proposed merger that have not been supported by reliable evidence. We remain unconvinced by the excuses we have heard offered to justify the merger.

The merging parties claim that national subscription radio service competes, indirectly, with a variety of partial substitutes. While AM/FM radio, iPods and other music recording and listening devices can offer similar prepackaged music or local signals similar to what satellite radio offers, none of them can offer immediate national programming, including live professional sports games from across the country to listeners across the nation. The track record of intermodal competition disciplining anticompetitive abuse is poor at best. “Bank shot competition” — the claim that partial or poor substitutes that are fundamentally different than the target product serve as competitors — has failed to protect consumers in similar situations. The result of relying on such competition in both merger and regulatory reviews has been rising prices and stagnation.

A perfect example is cable television. In the 1980s, federal policymakers claimed that cable TV competed with over-the-air broadcasting. Based on that understanding, the FCC deregulated cable systems in communities with three or more broadcast signals. Cable rates subsequently skyrocketed. By the late 1980s, the failure of this intermodal competition to discipline cable pricing was so obvious that the FCC proposed to increase the number of over-the-air stations necessary to represent effective competition to six. Seeing the results of this failed policy, Congress re-regulated cable in the early 1990s, and intervened in the market to help DBS satellite compete against cable (another form of intermodal competition).

In the decade after the Telecommunications Act of 1996, which largely deregulated cable rates, intermodal competition between cable and satellite failed to discipline cable rate increases. Average monthly cable bills have doubled since the 1996 Act. In short, intermodal competition from neither over-the-air TV nor from digital satellite distribution disciplined cable rates. The former had more limited channel capacity; the later had greater channel capacity. It did not matter. The empirical evidence from the cable market is clear. Only head-to-head competition delivers clear relief from anti-consumer, anticompetitive pricing.

In the satellite radio service product space, we face a similar configuration of products. Traditional broadcast radio, digital Internet distribution and mobile handheld devices, like iPods, that allow consumers to store and play music from their own collections or from online music sites, are touted as the intermodal competitors that will discipline prices. Yet there are distinct differences in product quality, listener experiences and mode of delivery. The touted competitors are not national, not mobile or not programmed. The growth in subscribership and revenues for Sirius and XM, based on their SEC 10-5 filings, reinforce the uniqueness of satellite radio's product offerings. Between 2005 and 2006, satellite radio subscribership rose from 9.3 million to 13.7 million — a nearly 50 percent increase. And combined revenue grew by nearly 100 percent. These data are not consistent with a market that competes with the growing market for digital listening devices. 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.

Consumers in the satellite radio space are afflicted by the very same pricing practices that afflict consumers in the cable space. Not only are prices high, but also the consumer is offered only large bundles of channels over which they have no choice. Consumer choice and consumer sovereignty are denied. In a product market where the marginal production cost of adding subscribers is almost zero, the bundling strategy is largely anti-consumer.⁷ This merger promises to make matters worse, with large capacity systems joining to create larger consumer bundles at higher prices. The merging parties have suggested they may provide consumers greater choice over the channels they pay for if the merger is approved, perhaps by offering tiers of programming. However, it is unclear whether their willingness to hold prices

⁷ The marginal production costs are certainly very low, if not zero, but we are told that the marginal transaction costs (i.e. customer acquisition costs) are high. However, it appears that this problem is a function of the bundling strategy. Having set such a high threshold price, the companies are forced to market aggressively to much narrower market segment.

near current levels does anything more than freeze pricing for yesterday's services. It appears that their promises not to raise prices above the current \$12.95/month price for a period of time does not apply to new packages that include the combined services of the two companies — like channel packages that could include Major League Baseball with live NBA basketball and NFL football games. In fact, it is very likely that the “merger benefits” of combining these offerings will require consumers to pay much more than \$12.95/month. Yet, in the absence of a merger, it is not clear why prices should not fall far below \$12.95/month for existing services if both companies continued to compete against each other and attempted to expand their base of customers.

The merging parties have suggested that post-merger, XM and Sirius subscribers will be held harmless not just on price but also on their current services — that they will receive the same programming they receive now. The purported benefit of the merger is that they will also have the option of receiving additional programming offerings without losing existing channels. Channel capacity will not be a limiting factor, the companies assert, because data compression technology allows them to fit more programming within the same bandwidth. Thus, we're told, XM subscribers would get every channel they get now, plus some Sirius channels, and vice versa. However, many are calling that assertion into question. Coverage of the merger in the March 19, 2007 edition of the *Washington Post* found substantial disagreement whether available technology would allow the companies to add more channels without losing existing channel offerings or degrading audio quality.³ If that is the case, then there is little consumer benefit to the merger. Consumers seeking content from both providers will need two sets of equipment because dual platform receivers are not yet available. Even when they do become available, it is unclear what they'll cost and whether the parties will offer them to consumers at reduced cost.

The suggestion that free, over-the-air radio will discipline pricing or packaging abuses after the satellite radio firms merge to monopoly, even though it did not restrain their pricing practices up to now is difficult to take seriously. Claims that existing or emerging distribution systems, like cell phones or Internet radio, will discipline the satellite radio monopolists pricing practices are equally suspect. The iPod has been around for a while and has been phenomenally successful, but it sells a very different service and its existence has not disciplined satellite radio pricing practices. There is no reason to believe that it will do a better job if a satellite radio monopoly is allowed to come into existence.

Although the specific product — satellite radio — is new, having been made possible by recent technological advancement, it has achieved a size that establishes it as a distinct product and makes it worthy of public policy attention. Annual revenues exceed \$1 billion per year. Abuse of market power in this space could impose a substantial cost on consumers.

Perhaps the most outlandish of all the claims being circulated by the merging parties is the argument that consumers will be better off with a benevolent monopolist than they would be with two competitors. In this ultra-short term view, competition is defined as wasteful,

³ Charles Babington, “Radio Deal Could Face Technical Difficulties,” *Washington Post*, D1, March, 19, 2007.

since redundant facilities lie unutilized. The monopolist can serve everyone while using less resources and the monopolist promises not to abuse the market power that would result. Without the stick of competition, however, the cost savings simply will not be passed through to the consumer. Indeed, the increase in market power will allow the post-merger monopoly to raise rather than lower prices.

The promise of benevolent monopoly is not worth the paper it is written on. The merging parties suggest the merger will increase consumer choice by giving consumers more than the 130 to 170 channels now available to them by consolidating their offerings, omitting the duplicative offerings while retaining highly demanded and niche channels — these are options that consumers can only have to date by subscribing to both services and buying two radios. Yet there is little discussion of the fact that it is the parties' own practices that have denied consumers choice in the past. Despite requirements by the FCC and the terms of their own patent dispute settlement to develop and provide interoperable radios that would have allowed consumers to switch providers without switching equipment, the companies have failed to meet that commitment. Claims by XM and Sirius that they were required only to "develop" the radio, but not to take steps to ensure it was commercially available provides little comfort to consumers denied choice nor should it ease criticism that these parties sought to comply with only the narrowest interpretation of the commitment. Now, we're told dual platform radios are on the cusp of development and will allow consumers to receive both signals simultaneously, easing technological challenges of the merger. But technology that allows consumers to switch services or subscribe to both if they choose should have been available independent of a merger. Yet instead of promoting consumer choice, the merging parties have forced consumers to invest in equipment that works with just one service, and once so invested, they are stuck with that choice.

Greater enthusiasm by the merging parties for interoperable and dual platform radios prior to the merger would have facilitated the very choice they now purport to offer consumers under the merger but *without* the necessity of a merger. It's important to point out that in their discussion of consumer choice, the merging parties fail to consider the loss of choice between the two providers as a meaningful one. The two parties have not, as a matter of business practice, offered consumers the most fundamental choice — which channels to pay for. They stuck with a high-priced, high volume bundle, which is anti-competitive and anti-consumer.

Moreover, under the scant details released to date, it 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. For policymakers inclined to accept the notion that consumers are better off with one rather than two satellite radio providers, we recommend, that the spectrum occupied by one of the current licenses be divested and made available for other consumer services. If all we need is one satellite radio company, why not auction half of the XM/Sirius spectrum for other commercial uses? Surely a free-market auction would enrich the Federal Treasury with plenty of money to compensate satellite radio subscribers for any

sunk equipment costs, offer consumers new broadband or other wireless services, and still enable Sirius and XM to combine their best offerings with substantial channel capacity.

Because this is a unique product market, once the competition is eliminated, prices will rise over time. More importantly, the primary driver of innovation and progress in both programming and technology – competition in the market – will be eliminated. Innovation will slow to the pace preferred by the monopolist and consumers will be much worse off in the long run. This is a Faustian bargain that America rejected over a century ago when we affirmed our commitment to competition by enacting the Sherman Act and later the 1934 Communications Act. The short-term benefit of a monopolist who is subject to political oversight is simply not worth the long-term costs of abandoning the competitive engine of economic progress.

Offers of conditions on the mergers should also be taken with a grain of salt. The recent track record of conditions has been abysmal and the satellite radio industry has already proven that it cannot be trusted to live up to conditions imposed on it. The satellite radio licenses were issued subject to the condition that the licensees never merge. Yet here they are asking to be excused from that condition. The licensees promised to offer the public interoperable radios that would work with both systems. Yet, ten years have passed and there is no such interoperability because the providers narrowly interpreted their obligation. We are told interoperable radios have been developed but are too costly and thus manufacturers will not install them. Yet we have no ability to verify whether the lack of commercial availability of interoperable radios is due to cost, is the result of technical barriers, or instead is a strategic decision to impose barriers to prevent consumers from switching services. In short, from day one they have failed to meet the conditions of their licenses and the public has suffered as a result.

A satellite radio merger to monopoly is about an avalanche of mergers. There was a key moment a decade ago when the Department of Justice decided that a large monopolist is no worse than two smaller monopolists and allowed the Bell Atlantic-NYNEX merger to go forward. That decision opened the door to a wave of mergers that doomed head-to-head competition in telecommunications. The old telephone monopoly was recreated as two huge geographically distinct monopolies that rarely, if ever, compete.

A satellite radio merger to monopoly will perform a similar bellwether function. If the agencies with oversight adopt a loose definition of products and markets and allow a merger to monopoly on the basis of intermodal competition, then a tsunami of mergers could ripple through the digital space at the worst possible moment. The firms that have declared their undying hostility to the open flow of products in the digital economy (broadcasters, telephone/cellular companies, cable companies), will be empowered to capture and stifle the alternatives, under the premise that every media and telecommunications product competes with all others and that new technologies and services will come along to protect the consumer in any case. That relief, however, will be slow and insufficient because the competitive core of the digital economy will have been damaged and the critical terrain of the

digital economy will be controlled by entities that have the same anti-competitive, anti-consumer objectives as the merging parties in this case.

We urge the Congress to tell the FCC and antitrust authorities to put the brakes on the proposed XM-Sirius merger unless and until significant questions on competition and consumer impacts are fully addressed and satisfactorily answered. It is time to hold the line against the greatest threat to a competitive and diverse media: mergers that concentrate ownership in too few hands.

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Testimony of Mr. Mel Karmazin

Chief Executive Officer

SIRIUS Satellite Radio

**Before the Senate Judiciary Committee's
Subcommittee on Antitrust, Competition Policy and
Consumer Rights**

**Regarding The XM-SIRIUS Merger: Monopoly or
Competition from New Technologies**

March 20, 2007

Mr. Chairman,

Good afternoon. Thank you, Chairman Kohl, Ranking Member Hatch, and members of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. I'm grateful for the opportunity to talk with you about how our merger with XM Satellite Radio will provide a significant consumer benefit and strengthen radio as we know it.

I'm Mel Karmazin, the Chief Executive Officer of SIRIUS Satellite Radio. Before I came to SIRIUS in 2004, I was president of Viacom, and before that, president of CBS. I've spent almost 40 years in radio, and just about my entire working life in the broadcast industry.

With me here today is Gary Parsons, the chairman of XM. Gary is a veteran of the communications business, a real leader in the world of satellite radio. Gary and I are both looking forward to working together to create an exciting new company.

Gary's leadership and talent are crucial to the future of radio. Gary, together with XM's CEO Hugh Panero, built XM into the success it is today. I should point out that XM has the largest digital radio facility of its kind in the country, and is headquartered right here in Washington where the combined company will continue to have a significant presence.

Let me begin by saying that audio entertainment in the United States is a very competitive and rapidly evolving market. The AM/FM radio broadcasting industry is highly competitive with respect to listeners and advertising revenues. There are over 10,000 terrestrial

radio stations. Radio comes as a standard feature in every vehicle manufactured without an additional cost to the consumer. Some radio stations have begun reducing the number of commercials per hour, expanding the range of music played on the air and experimenting with new formats in order to compete with other stations and with satellite radio. Several major radio companies have launched advertising campaigns designed to assert the benefits of traditional local AM/FM radio.

While most traditional AM/FM radio stations broadcast by means of analog signals, the radio industry has made significant strides in rolling out advanced digital transmission technology. Digital broadcasting offers higher sound quality than traditional analog signals and the multicast of as many as five stations per frequency, significantly increasing the quality and quantity of content available to consumers. Digital radio broadcast services have been expanding, and an increasing number of radio stations in the U.S. have begun digital broadcasting or are in the process of converting to digital broadcasting. I understand that over 1,150 radio stations in the United States currently broadcast digitally. Like traditional radio, digital radio is offered to consumers for free. BMW recently became the first automaker to offer factory-installed HD digital radio receivers as an option across all of its 2007 model year vehicles, and retail HD digital radios are available nationwide at many large retailers, including the nation's largest retailer, Wal-Mart, which announced two weeks ago that it will begin to sell HD radios.

A number of leading radio broadcasters have joined together to form the HD Digital Radio Alliance to accelerate the successful rollout of digital radio. The HD Digital Radio

Alliance has announced a \$250 million on-air advertising campaign to spur the adoption of digital radio.

Internet radio is also becoming a growing force in the market. A 2006 Arbitron study found that weekly listeners increased 50 percent in just the past year, and now approaches one in five Americans among key demographic segments. Internet radio broadcasts have no geographic limitations and can provide listeners with radio programming from around the country and the world. Improvements from higher bandwidths, faster modems and wider programming selections will make Internet radio an even more significant competitor for listening in the home and office. Wireless broadband technologies, like WiMax, will also make radio more pervasive and not just something for the home or office. Indeed, Avis has recently announced a deal with Autonet Mobile to offer Avis customers wireless internet access in their rental cars by Spring of this year. In addition to the many free Internet streams, subscription Internet music services offer unlimited and fully-customizable play lists for a small fixed fee per month.

Several of the largest wireless providers currently offer radio-like services which deliver music to mobile phones, and a number of phones now contain FM radios. For example, Sprint Nextel currently offers streaming music from a variety of providers plus a music store for purchase; Verizon Wireless offers the V CAST music service that can be played directly on a phone; and AT&T offers a variety of streaming content and has also partnered with Apple to offer the upcoming iPhone. Additionally, next generation wireless protocols will offer unprecedented mobile broadband coverage and broadcast capabilities.

A number of other companies and consortiums have announced plans to deliver broadcast audio and video content through mobile phones and other wireless devices. Three companies – MediaFLO USA, HiWire and Modeo – have acquired nationwide or near-nationwide spectrum to deliver audio and video content through existing wireless service providers and are in the process of implementing, testing and launching service. A joint venture of Sprint Nextel and several cable companies is implementing a similar mobile entertainment platform.

In addition, radio faces competition from numerous recorded media, including CDs, MP3 players and iPods. In fact, a large percentage of the new vehicles produced today come with an auxiliary jack in the radio solely to make MP3 players and iPods easier to use.

Contrast all of this amazing innovation with the market back in 1997, when the FCC granted licenses to SIRIUS and XM. Ten years may not seem long ago, but it was a different era in the evolution of audio entertainment. In 1997 there were no MP3 players, there was no HD radio, there was no Internet radio and no streamed music to mobile phones. Satellite radio was in its infancy, and had yet to even launch its satellites or service. The 1997 market should not guide policy decisions in 2007. Indeed, if we have learned anything over the last 10 years about technology-driven transformation, it is that the only thing certain about audio entertainment is that it will continue to change rapidly in the years ahead.

So in this fast changing environment, how will the merger of SIRIUS and XM benefit consumers?

- First, it will increase consumer choice. Today, you can get great music plus the NFL, NASCAR and Martha Stewart on SIRIUS; or, Major League Baseball, PGA Golf, Oprah and great music on XM. But if you want all of this, or the best of both, you need to subscribe to two services, buy two radios, and pay two monthly fees. Not surprisingly, only a small number of consumers make this choice. But if our merger is approved, we will offer consumers a much more attractive choice: the best of each service on one radio at a price below the cost of the two services today.
- Second, we will not raise prices. In fact, we expect to use a substantial portion of the savings from the synergies of the merger to lower the costs to consumers. In other words, subscribers who want to have a service that is substantially similar to their current SIRIUS or XM service will be able to do so, and they will not pay any more after the merger. Those who want to take advantage of new services, like the best of both program line-ups, will be able to do so for less than this would cost today – all with their current radio. We also plan to make programming choices available at a cost below today's \$12.95 per month.

I want to emphasize that we view better prices for consumers as a win-win:

something that would save consumers money and would strengthen our merged business at the same time. After all, we compete today with free terrestrial radio.

About 14 million people have signed up as subscribers for either SIRIUS or XM and now pay \$12.95 per month. The key to getting more subscribers for our merged company is not to widen the price gap between free and what satellite radio charges.

Instead, it is to offer consumers a better value – meaning, more quality programming at better prices.

- Third, no radio will become obsolete. After the merger, subscribers will be able to continue receiving either their present or expanded services using the radios they have today. At the same time, we fully expect that the merger will stimulate innovation by concentrating engineering talent and resources and accelerating the development of highly portable, low-cost, easy-to-use, multi-functional devices.
- Fourth, in the long-term the merger will help increase programming diversity. Both SIRIUS and XM already broadcast a wide range of commercial-free music channels, exclusive and non-exclusive sports coverage, news, talk, entertainment and religious programming, channels in Spanish, Korean and French, as well as weather and traffic information for many cities. In the long run, the merger synergies will make it possible to use our channel capacity to enhance this diversity.
- Fifth, we believe that the merger strengthens competition in the audio entertainment marketplace. Proud as we are of what we have accomplished in 10 years, the fact is that our combined 14 million subscribers translate into about 3.4% of national radio listeners, according to the Fall 2006 Arbitron Survey. Compare that to 237 million vehicles with AM/FM radios, approximately 220 million weekly AM and FM listeners, or even the 230 million PCs that can access Internet delivered programming. XM and SIRIUS are relatively small players in a highly competitive and rapidly

evolving audio entertainment marketplace: lightweights in an arena of heavyweights. The merger will make satellite radio a competitor with more choices and better prices, and consumers will be major beneficiaries of these changes.

These commitments to provide more choice, better prices, and utilize today's radios are more than just words. We know our customers. We know what they want, and we are committed to serving their needs for the long term. We are prepared at the appropriate time to discuss each of the issues I have discussed in my testimony with regulators and to guarantee these benefits as a condition of our merger approval. From our standpoint, these guarantees are not only good for consumers, they also are essential to the long term success of the combined company.

From our inception, satellite radio has been a subscriber-based business dependent on meeting consumer expectations on both price and programming. The dynamic growth in audio technology over the past 10 years has given consumers an impressive array of new and additional choices.

It has only been 10 years since satellite radio was licensed. Could we have predicted 10 years ago that the audio entertainment marketplace would look the way it does now? One reason for all the new technological advancements is that competition in the audio entertainment market is robust. We are seeing new entrants on a regular basis as the market continues to meet the needs of the consumer.

Given the expansive market – within which satellite radio is only one of many alternatives – we are certain that an accelerating level of competition will exist post-merger. There is little doubt that satellite radio faces stiff competition from many of the technologies and entertainment platforms that I have already described. In fact, I would like to note for the Committee that in the SEC filings of terrestrial radio companies, they readily acknowledge that they compete with satellite radio in a larger market for audio entertainment:

- From *Clear Channel Communications* 2005 Form 10-K; page 24: **“Our broadcasting businesses face increasing competition from new broadcast technologies, such as broadband wireless and satellite television and radio, and new consumer products, such as portable digital audio players and personal digital video recorders.”**

- From *COX Broadcasting / COX RADIO* 2005 Form 10-K; page 8-9: **“In addition, the radio broadcasting industry is subject to competition from new technologies and services that are being developed or introduced, such as the delivery of audio programming by cable television systems, by satellite digital audio radio service and by digital audio broadcasting. Digital audio broadcasting and satellite digital audio radio service provide for the delivery by terrestrial or satellite means of multiple new audio programming formats with compact disc quality sound to local and national audiences.”**

Clearly, we are in the middle of a rapid evolution of the audio entertainment industry marked by continuing innovation and expanding choice. It is not surprising in such a

competitive and changing environment that some competitors would seek to use government and regulatory processes to prevent others from developing and evolving their businesses.

Let me close by noting that the announcement of our merger has resulted in editorial support by observers with often different viewpoints and from very opposite ends of the ideological spectrum. There are few issues where you'll find the LOS ANGELES TIMES, the WALL STREET JOURNAL, USA TODAY, INVESTOR'S BUSINESS DAILY and the CHICAGO TRIBUNE in agreement. Yet the editorial boards of all of these newspapers – and several additional smaller outlets – have spoken out and said that our merger is meritorious and ultimately should be allowed by regulators. The LA TIMES concluded that the audio entertainment market "is very competitive, particularly among the national players." USA Today wrote: "the merged entity would represent a more potent competitor to entrenched broadcast interests, one that would offer its customers a more enticing and complete product."

Chairman Kohl, Ranking Member Hatch, and members of the Subcommittee, the audio entertainment market today is vibrant, competitive, and innovative, and every indication is that it will be even more so in the future. We believe that the combination of SIRIUS and XM will be good for consumers as it will intensify this competition, expand the choices for consumers and reduce prices. We appreciate this opportunity to share our views with you, and I look forward to answering any questions you may have.

Thank you.

Statement of U.S. Senator Herb Kohl
"The XM-Sirius Merger: Monopoly or Competition from New Technologies"
March 20, 2007

Today we are meeting to consider the proposed merger between the nation's only two national satellite radio services, XM and Sirius. This merger would eliminate competition between the only two satellite radio providers. And, we all agree that there is no prospect for a new satellite radio company to enter the marketplace. But that does not end our analysis. The question is not merely whether this merger would create a monopoly in satellite radio, but rather whether satellite radio is a distinct market so that consumers will have no real alternative should the combined company raise its price.

XM and Sirius provide a very attractive service of hundreds of channels of music, entertainment, sports, news and special interest content to consumers, broadcast in crystal clear sound quality. Much of their content -- whether specialty music channels, out of town broadcasts of pro football or major league baseball, major entertainment talent such as Oprah Winfrey or Howard Stern -- is unique to satellite radio and not duplicated by conventional over the air broadcasts. Unlike over the air radio, satellite radio is a mobile, national service, and its channels are available in every city and every rural area throughout the nation.

The merging companies and others who defend this deal argue that there exists ample competition from free over the air radio, and from new technologies such as wireless internet radio and the iPod, so that we shouldn't worry. As a result, they argue, the combined company will have no power to raise prices.

But we must view these claims with a healthy degree of skepticism. Over the air radio does not come close to duplicating the impressive array of program offerings of satellite radio. It also appears to us that iPods and other new technologies are either too new, too expensive, or too different from satellite to be included in the same market definition.

Mr. Karmazin, the last time you came before us was in 1999 when you were supporting the CBS/Viacom merger. At that time, I told you we thought that deal "created more synergy than suspicion," and we did not oppose the deal. This time, we are more suspicious.

So the burden of proof is squarely on you, Mr. Karmazin, to prove to us that our suspicions regarding monopoly and market power are unfounded. So while we do not doubt that this deal will be good for you and your shareholders, we have real worries that what may be a fabulous monopoly for you will be a real bad deal for consumers. You must explain to us why competition truly exists in the market. Most of all, you must convince us that consumers will not be harmed and forced to pay more once you have merged with your competitor.

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Statement of

Mary Quass

President and CEO

NRG Media, LLC.



Hearing on the
“XM-Sirius Merger: Monopoly or Competition
from New Technologies”

United States Senate
Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy
and Consumer Rights

March 20, 2007

**Statement of Mary Quass
President and Chief Executive Officer
NRG Media
On behalf of the National Association of Broadcasters**

**Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

March 20, 2007

Good afternoon Chairman Kohl, Ranking Member Hatch, and Subcommittee Members, my name is Mary Quass. I am the President and Chief Executive Officer of NRG Media, which owns and operates 84 local radio stations in seven midwestern states, including Illinois, Iowa, Kansas, Minnesota, Nebraska, South Dakota and Wisconsin. I am also a member of the Board of Directors of the National Association of Broadcasters (NAB), on whose behalf I am testifying today. NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

My message today is a simple one. Free over-the-air radio is embracing the future by investing substantial human and financial capital to complete its transition to digital broadcasting, which will enhance broadcasters' competitiveness and ability to serve local communities and listeners in myriad ways. All local stations ask is for the opportunity to compete in today's digital marketplace. To maintain a competitively level playing field, a government-sanctioned monopoly in satellite radio must be rejected. Approving a merger to monopoly of XM Radio and Sirius Satellite Radio would clearly harm consumers and jeopardize the valuable free over-the-air, advertiser-supported services provided by local radio stations. In addition, the imposition of a new

performance tax on digital broadcasts is unjustified and would likely impede the roll out of digital radio.

To Maintain A Fair And Level Competitive Playing Field, A State-Sanctioned Monopoly In Satellite Radio Must Be Rejected

Local radio stations are embracing the future by investing in new technologies, including high definition (HD) digital radio, so that we can continue to compete in a digital marketplace and improve our service to local communities and listeners. All we ask is for the opportunity to compete in this marketplace on a level playing field. Thus, the proposed merger to monopoly of XM Radio and Sirius Satellite Radio must be rejected.

Simply put, XM and Sirius are asking the government to grant them the sole license to the entire 25 MHz of spectrum allocated to satellite radio service. That is a government-sanctioned monopoly with an absolute barrier to entry by any other competitor. A merged satellite radio entity would control almost three hundred channels of radio programming in every local market in this country without any realistic check on its ability to assert market power, notwithstanding possible governmental attempts to impose conditions.

The drawbacks of a monopoly are clear. Monopolists have the ability to raise prices with little constraint and to discriminate. They need not compete to provide top-quality services. Monopoly providers do not respond quickly to consumer wants and needs; as a result, innovation suffers. In short, there is no reason to grant this proposed merger to monopoly in the market for national, multichannel mobile audio programming services.

The Merger Proposes To Create A Monopoly In The Relevant Market

XM and Sirius claim that they are not a monopoly but just one more competitor providing audio services. They would have government officials ignore the fact that a merged XM/Sirius would be the sole licensee of satellite radio spectrum; ignore the fact that no other entity can enter the satellite radio market; and ignore the fact that they would be able to use their position as the sole national provider to hurt local free over-the-air radio stations, which must sell advertising based on the numbers of listeners that they attract. There is no doubt that the effect of the proposed transaction “may be substantially to lessen competition, or to tend to create a monopoly” in the provision of satellite radio services, contrary to antitrust law.¹

Local stations do not compete in the national market for the multichannel mobile audio services offered only by XM and Sirius. Broadcasters’ signals are not nationwide, do not move from one geographic area to another, and are not available only by subscription. Free over-the-air programming, unlike satellite radio programming, must primarily depend on commercial advertising. Even utilizing digital technology, local stations can offer only a few multicast programming streams, in comparison to the hundreds controlled by XM and Sirius. In addition, broadcasters do not – and cannot under existing law and regulation – air certain content offered by subscription satellite radio, particularly content that would invite indecency complaints and enforcement actions.² For all these reasons, local terrestrial radio broadcasting is not a substitute for national multichannel satellite radio, and consumers regard these services as distinct.

¹ Section 7 of Clayton Act, 15 U.S.C. § 18.

² For example, XM offers a number of channels labeled “XL” that frequently feature explicit language; these channels include hard rock, heavy metal, punk and hip-hop music and uncensored

Indeed, when initially authorizing satellite digital audio radio service (DARS) in 1997, the FCC recognized that satellite radio, with its national reach, offers “services that local radio inherently cannot provide.”³ For example, unlike local terrestrial radio stations, satellite radio can provide continuous service to the long-distance motoring public and to persons living in remote areas. XM has stated that its nationwide service can reach nearly 100 million listeners age twelve and over who are outside the 50 largest Arbitron radio markets (with the largest number of radio stations). XM also estimates that, of these 100 million listeners, 36 million live outside the largest 276 Arbitron markets and that 22 million people age twelve and older receive five or fewer terrestrial radio stations.⁴ Unlike even the most powerful terrestrial radio stations, which can still only reach a mere fraction of American consumers over-the-air, satellite radio can reach all listeners across the country with vastly more channels than any single terrestrial broadcaster. Other media industry observers have agreed that “[s]atellite radio is a national platform,” thereby clearly differing from locally-licensed and locally-oriented terrestrial broadcast stations.⁵ Simply put, only XM and Sirius compete in this national, multichannel mobile radio market, and they are proposing to form a state-sanctioned monopoly in that market.

From the point of view of a local broadcaster, I think it’s clear that only XM and Sirius compete in this market for national multichannel radio services. Assume, for

comedy. Sirius also has a number of “uncut” and “uncensored” channels, including hip-hop, comedy, talk (such as Howard Stern), and Maxim, Cosmo and Playboy radio.

³ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754, 5760-61 (1997) (*Satellite DARS Report & Order*).

⁴ XM Satellite Radio, Inc., Annual Report (SEC Form 10-K) at 2 (March 15, 2001).

⁵ Katy Bachman, *Buyers: Size Not Enough for Sirius/XM Merger*, Media Week (Feb. 26, 2007) (quoting Matt Feinberg, Senior Vice President of Zenith Media).

example, that the merged XM/Sirius were to raise its subscription rate a small amount, such as five percent. After this price increase, would XM/Sirius lose so many subscribers to other providers such as my local stations that the price increase would be unprofitable for the combined company? If not, then free over-the-air radio and other audio services are not substitutes for satellite radio and do not compete in the same market as providers of satellite radio services.

Given the significant differences between a nationwide, multichannel subscription audio service and local, advertiser-supported over-the-air radio service, as detailed above, it is highly unlikely that a consumer currently subscribing to satellite radio would drop their subscriptions and substitute other audio services for satellite DARS if the price of satellite radio were to increase by a small but significant amount, such as five percent or even five-to-ten percent. The parties to the proposed merger have not offered support for the proposition that terrestrial radio or other audio technologies such as Mp3 players would have a disciplining effect on the ability of a combined XM/Sirius to raise prices. In fact, Sirius CEO Mel Karmazin stated in January that Sirius was “open” to higher pricing; that Sirius believed there was “elasticity in our price point,” and that prices increases are “a good option for us.”⁶ If Sirius believed that it could successfully raise its subscription prices, even in the face of competition from XM, then clearly a combined XM/Sirius would feel little if any competitive constraints in increasing subscriber fees. Indeed, Mr. Karmazin has pointed out that in Canada where Sirius has a “significant lead in satellite radio,” their service is “priced at a higher price point.”⁷ This confidence in the

⁶ Citigroup 17th Annual Entertainment Media & Telecommunications Conference (Jan. 10, 2007), webcast available at <http://investor.sirius.com/medialist.cfm>.

⁷ *Id.*

ability of satellite radio providers to increase their prices without losing subscribers shows that satellite radio is the relevant product market for any antitrust analysis.

Other evidence suggests that demand for satellite radio services is highly inelastic and would not be significantly lessened by increases in subscriber fees. For instance, there is an extremely low “churn” rate among satellite radio subscribers.⁸ This indicates that other audio services are not regarded by consumers as effective substitutes for satellite radio.

Finally, it is instructive to note that when analyzing the comparable proposed merger of EchoStar and DirecTV, the only two providers of satellite television services, the FCC tentatively defined the relevant market as “no broader than the entire MVPD [multichannel video programming distribution] market.” However, the FCC found that the product market in question “may well be narrower than that,” and might include only the two national satellite television providers, excluding multichannel cable operators and local terrestrial broadcast television stations.⁹ Similarly, local terrestrial radio stations should not be regarded as competing in the marketplace for nationwide multichannel satellite radio services.

In sum, it is clear that the proposed merger of XM and Sirius would substantially “lessen competition” or “tend to create a monopoly” in the market for nationwide, multichannel mobile audio programming services, contrary to the Clayton Act. As explained in detail below, a XM/Sirius merger would further violate FCC rules and

⁸ See, e.g., *Howard's way; Satellite radio*, *The Economist* (Jan. 14, 2006) (churn rate of dissatisfied customers who drop the service is barely 1.5 percent a month for Sirius, which is among the lowest for any subscription business).

⁹ *EchoStar Communications Corp.*, 17 FCC Red 20559, 20609 (2002).

precedent, congressional policy and established antitrust case law; would result in significant competitive harms without any corresponding public interest benefits; and would reward companies with a history of breaking the rules by granting them a monopoly in the provision of nationwide multichannel audio services.

The Proposed Merger Violates FCC Rules And Precedent, Congressional Policy and Judicial Decisions

The FCC specifically refused to sanction a monopoly when it originally allocated spectrum for satellite radio service in 1997. It chose not to permit a monopoly satellite radio service because “licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices.” *Satellite DARS Report & Order*, 12 FCC Rcd at 5786. And, I note, the agency was assuming at that time that each provider would control around 50 channels, not the 282 channels that a united XM/Sirius would have today.

Ironically, the FCC in part based its decision to require multiple satellite radio providers on arguments presented by Sirius. During the FCC’s consideration of how many different satellite radio providers it should authorize, Sirius (then called CD Radio) argued strenuously that multiple providers were necessary to “assure intra-service competition,” including price competition, and to guarantee a diversity of program offerings.¹⁰ Given these competitive concerns, Sirius explicitly stated that no satellite radio provider should ever be permitted to combine with another provider. *See* CD Radio Comments at 18. Now, only a few years later, Sirius apparently sees no problem with allowing the satellite radio market to become monopolized by a single provider with control over the entire national market.

¹⁰ CD Radio Comments in IB Docket No. 95-91, at 17.

But in fact it would be entirely inconsistent with the pro-competitive satellite radio licensing scheme created by the Commission to now allow XM and Sirius to combine into a monopoly enterprise. At the urging of the parties, including Sirius, the Commission in 1997 explicitly prohibited any such future merger by determining that, “after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license.” *Satellite DARS Report & Order*, 12 FCC Rcd at 5823. There is no basis for reversing that decision now.

In a parallel circumstance, the Commission refused in 2002 to permit a merger of the only two nationwide Direct Broadcast Satellite (DBS) licensees, EchoStar and DirecTV. In rejecting this proposed merger, the Commission found in a unanimous vote that the combination would undermine its goals of increased and fair competition in the provision of satellite television service. The agency also found that the claimed benefits of efficient spectrum use were outweighed by substantial potential public interest harms that might result from the transaction, including reduced innovation, impaired service quality and higher subscription prices. The Commission further stressed that the merger would eliminate a current viable competitor from every market in the country and would result in one entity holding the entire available spectrum allocated to the DBS service.¹¹

For precisely the same reasons, XM and Sirius should not be permitted to create a monopoly that would eliminate a viable competitor from every market across the country and that would control all the spectrum allocated to a nationwide satellite service. Such a merger would likely “increase the incentive and ability” of the parties “to engage in anticompetitive conduct.” *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20662.

¹¹ See *EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20562, 20626, 20661-62 (2002) (*EchoStar/DirecTV Merger Order*).

Beyond violating FCC rules and precedent, such a government-sanctioned monopoly would clearly also be inconsistent with congressional policy favoring competition over monopoly, as expressed in the 1996 Telecommunications Act, and with long-standing enforcement of the antitrust laws. Indeed, the courts have held that even mergers to *duopoly* are, on their face, anticompetitive and contrary to the federal antitrust laws.¹² Without question, a merger to *monopoly* would be anticompetitive, inconsistent with antitrust precepts and contrary to judicial decisions.¹³

XM and Sirius Will Be Able To Exercise Virtually Unlimited Market Power In The National Radio Market, To The Detriment Of Consumers

The harms that would result from this proposed merger would be numerous and obvious. Having monopoly status would enable the united XM and Sirius to exert greater pressure on programming suppliers. Eliminating competition in the national mobile radio market would also greatly reduce incentives for the combined XM and Sirius to innovate. A monopolistic market structure is inevitably less innovative than a competitive one, and the consumers of satellite radio service will accordingly fail to benefit from innovations such as new programming services and technical improvements. In fact, when declining to approve the EchoStar/DirecTV merger, the FCC specifically found that the satellite television merger “would likely reduce innovation and service quality.”

EchoStar/DirecTV Merger Order, 17 FCC Rcd at 20626.

Perhaps most obviously, enjoying monopoly status would permit a merged XM/Sirius to raise subscription prices to the detriment of consumers. Without the

¹² See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

¹³ See, e.g., *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1081 (D.D.C. 1997) (enjoining merger of two competing office supply superstores where the merger would have left only one superstore competitor in 15 metropolitan areas and only two competing superstores in 27 other areas).

presence of a similarly-situated, direct competitor, a satellite radio monopolist could raise rates without any realistic competitive check on its actions. See *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20626-29 (lengthy discussion about the “harms that consumers are likely to suffer from the higher prices likely to result” from the proposed satellite television merger). Indeed, the courts have enjoined mergers to monopoly on the grounds that such mergers would allow the combined company “to increase prices or otherwise maintain prices at an anti-competitive level.” *FTC v. Staples*, 970 F. Supp. at 1082.

Beyond resulting in rate increases for consumers, the XM/Sirius monopoly would also likely reduce program diversity. As explained by the Commission when authorizing XM and Sirius, competing satellite radio providers would each have incentives to diversify their own program formats, thus providing valuable niche programming. See *Satellite DARS Report & Order*, 12 FCC Rcd at 5762. Without such competition, program diversity would likely be adversely affected, with consumers losing music and talk formats, especially niche ones.

There is also the very real risk that a combined XM/Sirius will use its market power to force content providers, including sports programmers, to deal only with them. If the merger is approved, it may only be a matter of time before the American public can listen to their favorite baseball or college football team by paying whatever monopoly rents a combined XM/Sirius chooses to charge. We’ve seen it happen with cable, and given the obvious incentives, there is every reason to expect the same thing to happen here. In sum, in a monopoly environment, satellite radio subscribers would pay higher prices for less diverse and less innovative programming.

A combined XM/Sirius could moreover maintain any supra-competitive subscription prices because satellite radio is a closed market. No other entity can enter the national multichannel audio service market. The FCC has not authorized any other licensees to provide satellite DARS. Even in the highly unlikely event that the FCC would in the future allocate additional spectrum to this service to permit entry by new satellite providers, this entry would clearly be insufficient to ameliorate the anticompetitive effects of the proposed merger. For example, the Department of Justice requires that, for potential entry to be considered, it must generally be achieved within two years.¹⁴ This is extremely unlikely in the case of satellite radio, as it took XM and Sirius three to four years from the grant of spectrum by the FCC to commercial availability, including the technically challenging step of launching satellites. Other entry barriers are also very high, including the capital costs (such as the costs of multi-million dollar satellites), programming acquisition costs, and subscriber acquisition costs. Therefore, the threat of entry by other entities will be completely ineffective in constraining short-term (or even long-term) price increases by the combined XM/Sirius.

The anticompetitive effects of the proposed merger are thus enhanced by not merely high, but practically insurmountable, barriers to entry. The courts have consistently rejected mergers where the merging parties were unable to show that reduced competition caused by the merger would be ameliorated by competition from new entrants that could come into the market.¹⁵

¹⁴ See U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* at 25-26 (April 8, 1997) (DOJ Merger Guidelines).

¹⁵ See, e.g., *FTV v. Heinz*, 246 F.3d at 717; *FTC v. Staples*, 970 F. Supp. at 1086-87; *FTC v. Swedish Match*, 131 F. Supp.2d 151, 170-71 (D.D.C. 2000).

XM and Sirius Have A Long Track Record Of Breaking The Rules

The government cannot and should not rely on any promises that a united XM and Sirius, as a government-sanctioned monopoly, will not cause harm to consumers. Their past behavior in a number of instances shows otherwise.

First, when initially authorizing satellite radio, the FCC adopted a rule on receiver interoperability that was designed to promote competition by enhancing consumers' ability to switch between DARS providers. *Satellite DARS Report & Order*, 12 FCC Rcd at 5796. Despite a clear FCC directive that their satellite radio systems must include "a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction,"¹⁶ no such device is available to consumers today. While both companies certified nearly ten years ago that they would comply with this pro-competition, pro-consumer requirement, neither XM nor Sirius markets a consumer-friendly interoperable device.

Second, both XM and Sirius have violated FCC rules governing the production and distribution of their receiver equipment,¹⁷ which are designed to ensure that these types of devices do not interfere with broadcast radio stations or other licensed spectrum users. As a result of XM and Sirius producing and distributing receiver equipment that violates – and in a number of cases very greatly exceeds – FCC limits on the power levels for such equipment, many listeners to terrestrial radio stations experience "bleedthrough" and receive the XM or Sirius signal without warning through their radios. As has been widely reported, the FCC has received many complaints from both commercial and non-

¹⁶ 47 C.F.R. § 25.144(a)(3)(ii).

¹⁷ 47 C.F.R. Part 15.

commercial listeners who suddenly hear uncensored and unwelcome satellite radio programming on their car radios.¹⁸

Third, both XM and Sirius have routinely and regularly violated FCC technical rules in connection with their special temporary authority to use terrestrial repeaters. For years XM operated more than 142 repeaters (or 18 percent of all its repeaters) at unauthorized locations and at least 19 of its repeaters without any FCC authorization at all. Even after confessing and seeking the agency's forgiveness for its violations, XM to our knowledge currently continues to operate at least four of its repeaters without any FCC authorization. Also troubling is XM's confession that for years it has operated more than 221 terrestrial repeaters (or 28 percent of all its repeaters) at unlawful power levels. In mid-February, the FCC issued a letter of inquiry to XM about its unlawful repeater network. Sirius has engaged in comparable and other technical violations in connection with its terrestrial repeaters, constructing at least 11 of its repeaters at locations different from what they reported to the FCC, including one in Michigan that is 67 miles away from its reported and authorized location.

Against this backdrop of rule violations, allowing XM and Sirius to create a monopoly in violation of the FCC's anti-merger decision and decades of communications and antitrust policy could simply embolden them to pay even less attention to the rules of the road in pursuit of monopolistic profits.

¹⁸ See, e.g., *A Mystery Heard on Radio: It's Stern's Show, No Charge*, New York Times, January 26, 2007 at A17.

*No Marketplace Or Business Conditions Or Any Public Interest Benefits Justify
The Risk Of Monopoly*

There is no need to risk all these harms by creating this monopoly. Satellite radio is still in its early stages of development. And neither XM nor Sirius is a failing company. From an economic perspective, the classic “shut down” analysis illustrates that a firm will exit an industry when its average variable cost exceeds price, which implies that the last unit sold makes a negative contribution to the firm’s margins. When applied to XM and Sirius, there is no basis to conclude that either company is ready to exit the industry. A review of reports by equity analysts demonstrates that Sirius and XM are currently earning positive margins on their last subscribers. Moreover, as satellite radio penetration rates increase, average variable costs will decrease and thereby generate even larger margins. Thus, there is no basis in economic fact for a failing-firm argument.

In fact, XM does not believe that either itself or Sirius will go out of business if the merger does not occur. In a recent filing with the Securities and Exchange Commission, XM disclosed a set of questions-and-answers regarding the merger prepared for and distributed to its employees. I quote: “Can Sirius and XM succeed as stand-alone companies if the merger is not approved by regulators? – **YES**. That said, we believe a merger is the **preferred** option for Sirius and XM, our shareholders and customers” Of course Sirius and XM would prefer not to compete with one another, and would prefer to reap the benefits afforded by monopoly status. What company wouldn’t? That’s why the United States has and enforces antitrust laws.

Claims that XM and Sirius are weak or failing businesses based on their levels of debt and expenses must be viewed skeptically. It is true that XM and Sirius have had some extraordinary expenses - like the nearly \$83 million in stock that Sirius awarded to

Howard Stern in January, on his first anniversary on satellite radio. Indeed, the high costs of locking-up national and regional programming, especially sports programming, on an *exclusive* basis accounts for a great deal of the cost overhead. But, should companies expect a government bailout for questionable business decisions?

Changes in the audio marketplace do not justify this merger either. These changes have encouraged local radio stations to enhance their competitiveness by converting to digital audio broadcasting. But the introduction of new audio products has not prompted terrestrial radio broadcasters to ask for an unjustified government licensed and sanctioned monopoly. For all the reasons described above, monopolies are inherently bad.

Beyond harming consumers, a satellite radio monopoly would have the incentive and the opportunity to engage in unfair competition and anticompetitive practices against other audio service providers, especially local radio broadcasters. For example, after a satellite monopoly restructures (unbundles) its program offerings, as promised, we can expect, based on press reports, that the monopoly will attempt to accelerate the acquisition of new subscribers by offering them a lower-cost point of entry -- likely a basic advertiser-supported tier offered for less than the current \$12.95 per month. On its face, such a plan may not sound bad, but of course no introductory price would be locked in and a monopoly provider could easily raise this price at a later time to increase profits at the expense of consumers.

Furthermore, the merger parties' announced intention to go after advertising revenue is plainly problematic when one considers the monopoly status of the merged satellite radio operator. With monopoly rents from subscription service, the satellite

radio monopoly would have the incentive and ability to cross subsidize its advertiser-supported channel offerings using the monopoly rents from subscription service, likely resulting in unfair competition in the form of predatory, cut-throat pricing in national advertising markets. In addition, the satellite radio monopoly would not stop at national advertising. The combined terrestrial repeater networks of Sirius and XM under common control would offer substantial opportunities for entry into the local advertising markets by a satellite radio monopoly. The rates for local advertising could be set artificially low with cross-subsidization from monopoly prices. The valuable free, over-the-air service provided by local radio stations – which is entirely advertiser-supported – would be jeopardized by these developments.

The Proposed XM/Sirius Merger Should Be Summarily Rejected

Without question, XM and Sirius will be unable to meet their burden of proof demonstrating the high level of public interest benefits to even consider granting a government-sanctioned monopoly. As an initial matter, “[e]fficiencies almost never justify a merger to monopoly or near monopoly,” such as the proposed XM/Sirius merger.¹⁹

In declining to approve the comparable EchoStar/DirecTV merger, the FCC explained that where “a merger is likely to result in a significant reduction in the number of competitors and a substantial increase in concentration, antitrust authorities generally require the parties to demonstrate that there exist countervailing, *extraordinarily large*, cognizable, and non-speculative efficiencies that are likely to result from the merger.” *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20604 (emphasis added). The courts

¹⁹ *FTC v. Heinz*, 246 F.3d at 720, quoting Department of Justice Merger Guidelines, § 4.

have similarly stressed that proof of extraordinary efficiencies is required to rebut the presumption that a merger in a concentrated market (such as the current duopoly market for nationwide, multichannel mobile radio service) will be anticompetitive. *See, e.g., FTC v. Heinz*, 246 F.3d at 720-21. Claims of greater efficiencies must be verifiable through evidentiary showings that are “more than mere speculation and promises about post-merger behavior.” *Id.* at 721.

And not only must the parties proposing such a merger show that very significant efficiencies would result, they must show that these efficiencies “would lead to benefits for consumers.”²⁰ Courts, for example, have rejected insufficiently documented claims from merger parties that cost savings resulting from efficiencies would actually be passed on to consumers in the form of lower prices.²¹ Thus, unsubstantiated claims about the large cost savings that would result from the XM/Sirius merger are woefully inadequate to justify a combination reducing competition in a concentrated market.

Moreover, to be considered in justifying a merger, claimed efficiencies must be “merger-specific” – that is, they must be ones that neither firm could achieve independently. If the claimed efficiencies are not merger-specific, then “the merger’s asserted benefits can be achieved without the concomitant loss of a competitor.” *FTC v. Heinz*, 246 F.3d at 721-22. Claims that the merger will allow XM and Sirius to design equipment allowing customers to receive signals from both companies are not merger-specific;²² there is nothing preventing them from undertaking such a project today except

²⁰ *United States v. Franklin Electronic Co., Inc.*, 130 F. Supp.2d 1025, 1035 (W.D. Wis. 2000).

²¹ *See, e.g., FTC v. Swedish Match*, 131 F. Supp.2d at 172; *FTC v. Staples*, 970 F. Supp. at 1090.

²² *See* Frank Ahrens, *In the Same Orbit, but on Different Planets*, Washington Post, Feb. 21, 2007 at D01 (“Karmazin said a merger would lead to savings by eliminating duplications in

for the fact that they compete to retain customers on the basis of sunk costs in equipment.

Clearly, XM and Sirius will fail to meet their heavy burden of demonstrating the efficiencies and consumer benefits of their proposed merger to monopoly. Rather than producing “extraordinarily large,” beneficial efficiencies, the merger, if approved, would seriously impair marketplace competition and cause real harms to consumers. There is no reason to approve a merger that would violate FCC rules and precedent, as well as congressional policy, and would grant a state-sanctioned monopoly to non-failing companies with a long track record of breaking the rules.

Moreover, even if the parties agreed to price regulation to ensure that satellite radio customers do not pay more (for some period of time) after the merger than they did before, such a condition does not justify approval of the proposed merger. Indeed, permitting a merger based on such a condition disregards the very reason the antitrust laws apply to mergers – to ensure that markets are structured in a way to promote competition. The notion that a competitive market structure, which has produced healthy competition between XM and Sirius, should be replaced by a monopoly provider subject to price regulation is antithetical to the purpose and foundation of the antitrust laws and to congressional policy favoring competition over regulation, as expressed in the 1996 Telecommunications Act.

In fact, the FCC did not believe that a national pricing plan was an appropriate solution to the competitive harms likely to be caused by the proposed EchoStar/DirecTV merger. Even assuming such a plan could be an effective remedy for competitive harms (which the FCC found unlikely), the FCC concluded that the pricing plan was

programming and operations,” and that the “companies plan to design equipment to let customers receive signals from both companies, which use different satellite technologies”).

inconsistent with the Communications Act and with regulatory policy and goals favoring the replacement of regulation with competition, especially facilities-based competition. *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20663. Because the XM/Sirius merger would “totally eliminate what appears to be a very healthy level of intramodal competition among the two-facilities based” satellite radio providers, it should be rejected, just as the FCC declined to approve the EchoStar/DirecTV merger even with pricing conditions. *Id.*

Local broadcasters fully support competition on a level playing field. When all the factors are considered, the proposed merger of Sirius and XM is simply anticompetitive. It is a monopoly in violation of the antitrust laws. Congress should clearly and expeditiously express its opposition to this merger to both the Department of Justice and the FCC.

The Imposition Of Performance Rights In Sound Recordings For Digital Broadcasts Is Not Justified And Would Likely Impede The Roll Out Of Digital Radio

Local radio broadcasters are currently fully engaged in an exciting transition to digital audio broadcasting (DAB). Radio broadcasters are embracing HD digital radio because it will enable us to better serve our local listeners and communities and to remain competitive in today’s digital media marketplace. But we face many challenges as we work toward a successful and timely transition to digital radio.

First, the radio industry – and that means thousands of stations across the country in markets of all sizes – must make the investment in digital technology and begin broadcasting digital transmissions. This effort is well underway, as 1223 HD radio stations are already on the air. HD radio not only offers crystal-clear audio, it also

permits the broadcasting of multiple free, over-the-air program streams to bring additional content, including much more local content, to the public within stations' current spectrum. It further allows other services, including wireless data enabling text information, such as song titles and artists or weather and traffic alerts. Even more innovative features are under development, such as program menus giving listeners instant access to a favorite drive time show, news and information, and special music programming. In sum, digital radio will allow broadcasters to improve service to their listeners and to remain a vital and vibrant part of the media landscape of the future.

But beyond thousands of stations converting to digital, the HD radio revolution also involves the consumer electronics industry, the automobile industry and, most importantly, consumers. For consumers to be able to reap the benefits of the digital conversion, the consumer electronics industry must produce a range of all-new digital radio receivers for both the car and the home. Automotive companies will need to offer factory-installed digital HD radio receivers in automobiles across a variety of models and price ranges. Finally, just as with the digital television transition, consumers must be informed about digital radio. To educate consumers and accelerate the successful roll-out, a consortium of top U.S. radio companies created the HD Digital Radio Alliance in 2005, which, among other activities, has created and financed advertising campaigns to increase the public's awareness of this exciting technology and its many benefits.

These challenges to an expeditious and successful roll-out of digital radio would be exacerbated – and the roll-out jeopardized – by the unjustified imposition of new performance rights in sound recordings that some have suggested should be imposed when radio broadcasts in digital. The imposition of a new performance tax on digital

radio broadcasting would increase the costs on a nascent technology and discourage radio broadcasters, particularly smaller groups and stations in rural areas, from expending the funds necessary to convert to digital and to inform the public about the benefits of HD radio. Discouraging the conversion to DAB would ultimately impair the ability of local stations to compete in today's marketplace against other digital media. Most importantly, it would not serve the interests of consumers, who would greatly benefit from improved sound quality and new digital services, including multicast services bringing unique and diverse radio programming to local communities.

At the outset, the Subcommittee should know that radio stations already pay hundreds of millions of dollars annually to the composers and publishers of the music they broadcast. With respect to sound recordings and performance rights, NAB urges the Subcommittee to recognize that artists and labels receive invaluable compensation in the form of airtime and exposure. A new performance rights tax on broadcasters is therefore unnecessary and, indeed, counterproductive to the development of new radio services that will benefit consumers and performers alike, who will receive airtime and exposure on a greater number of free programming streams. Certainly members of this Subcommittee do not have to be reminded how very valuable airtime is to getting your message out to the public.

Throughout the history of the debate over sound recording copyrights, Congress has consistently recognized that recording companies reap very significant promotional benefits from the exposure given their recordings by radio stations and that placing burdensome restrictions on performances could alter that relationship, to the detriment of both industries. For that reason, in the 1920s and for five decades following, Congress

regularly considered proposals to grant copyright rights in sound recordings, but repeatedly rejected such proposals.

When Congress first afforded limited copyright protection to sound recordings in 1971, it prohibited only unauthorized reproduction and distribution of records, but did not create a sound recording performance right. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, but rejected, granting a sound recording performance right. Congress continued to refuse to provide any sound recording performance rights for another 20 years. During that time, the recording industry thrived, due in large measure to the promotional value of radio performances of their records.²³

It was not until the Digital Performance Right in Sound Recordings Act of 1995 (DPRA) that even a limited performance right in sound recordings was created. In granting this limited right, Congress stated it “should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.”²⁴ As explained in the Senate Report accompanying the DPRA, “[t]he underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscription and interactive services – but not by broadcasting and related

²³ See, e.g., S. Rep. No. 93-983, at 225-26 (1974) (“The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure on the promotion efforts of broadcasters.”).

²⁴ S. Rep. No. 104-128, at 15 (1995 Senate Report); accord *id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not “upset[] the long-standing business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.”).

transmissions.” *1995 Senate Report* at 17.

Consistent with Congress’ intent, the DPRA expressly exempted from sound recording performance right liability non-subscription, non-interactive transmissions, including “non-subscription broadcast transmission[s]” – transmissions made by FCC licensed radio broadcasters.²⁵ Congress made clear that the purpose of this broadcast exemption was to preserve the historical, mutually beneficial relationship between recording companies and radio stations:

The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and the careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.

1995 Senate Report at 14-15.

The Senate Report similarly confirmed that “[i]t is the Committee’s intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.” *Id.* at 15. In sum, the transition of traditional local radio stations from analog to digital presents no basis to alter fundamentally the long-standing mutually beneficial relationship between the recording and broadcasting industries by imposing a new performance tax on digital broadcasts, when one does not

²⁵ 17 U.S.C. § 114(d)(1)(A).

exist in analog.

NAB further stresses that this discussion is not intended to minimize legitimate concerns the recording industry may have about the need for copy protection in the digital environment. Rather, it is intended to assist the Subcommittee in understanding why a new performance right for sound recordings is unconnected to those concerns.

Conclusion

Free, over-the-air local radio stations are embracing the future by transitioning to digital broadcasting so as to remain competitively and financially viable and better able to serve their listeners and communities. Congress should assure the maintenance of a level playing field in the audio marketplace by expressing its opposition to a satellite radio monopoly, which would injure consumers and impair the ability of other audio service providers to compete and to serve listeners. The imposition of a new performance tax on digital broadcasts is also unjustified, and would likely impede the roll out of digital radio to the detriment of consumers and local radio stations.

**Statement of Mary Quass
President and CEO, NRG Media
On behalf of the National Association of Broadcasters**

**Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
March 20, 2007**

The NAB opposes the satellite radio monopoly that would result from a merger of XM Radio and Sirius Satellite Radio. When the FCC authorized satellite radio service, the Commission explicitly refused to sanction a monopoly in order to promote competitive prices and a diversity of programming. The proposed satellite radio merger would be contrary to public policy as expressed in these FCC decisions, the 1996 Telecommunications Act, and long-standing enforcement of antitrust laws.

A merged XM and Sirius would eliminate competition in the closed market for satellite radio service, thereby risking increases in consumer rates, discrimination among program producers and providers, and leaving no viable alternatives to the merged entity. The innovation fostered in a competitive environment would be lost as well.

The basic characteristics of satellite radio are unique. XM and Sirius offer a pre-packaged bundle of national, mobile, digital radio channels. A local radio station's programming is not a reasonable alternative to the array of services offered by XM or Sirius. All of XM and Sirius' channels are heard nationwide, while local radio stations can only broadcast within their FCC-defined market. The national availability of satellite radio sets it apart from terrestrial radio.

Clearly, the proposed merger would produce monopoly harms without any conceivable justification. By their own admission, XM and Sirius are not failing companies; the merger offers no significant efficiencies leading to benefits for consumers; and these companies' long track record of breaking the rules raises grave doubts about their compliance with any post-merger promises or conditions. Congress should express its opposition to creating an anticompetitive government-sanctioned monopoly.

**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"**

March 20, 2007

Chairman Kohl, Ranking Member Hatch and other members of the Subcommittee, my name is Gigi B. Sohn. I am the President of Public Knowledge, a nonprofit public interest organization that addresses the public's stake in the convergence of communications policy and intellectual property law. I want to thank the Subcommittee for inviting me to testify on the proposed merger of XM Satellite Radio and Sirius Satellite Radio.

Introduction and Summary

The merger of XM Satellite Radio and Sirius Satellite Radio presents a dilemma for public interest advocates. On the one hand, the only two providers of radio services via satellite, who have vigorously competed over the past five and a half years, are seeking to consolidate, immediately raising questions about the impact on prices and choice for consumers. On the other hand, this vigorous competition has led to a spending war for new and better programming, leaving both competitors weakened in a world where Internet radio, HD radio, cable radio and other multichannel music, entertainment and information services have become increasingly popular.

Some will say that XM and Sirius' current financial state is a problem of their own doing – that a service that was intended largely to provide an alternative for the strict playlists and over-commercialization of broadcast music radio spent lavishly and foolishly on radio personalities and major league sports. They will also say that allowing a merger is a government “bail-out.” I agree with both of these statements. But I do not believe that is where the focus should be here.

Instead, the salient question for policymakers is this: if this merger is simply denied, will consumers be better off? Given the financial state of both companies, their slowing customer base and the growing competition in the marketplace, it appears likely that in the absence of a merger, both services will continue to limp along instead of investing in new and diverse programming. Might it not be better for consumers to permit the merger under conditions that provide expanded programming and pricing choice along with temporary measures to keep prices in check? After a great deal of discussion with my public interest colleagues, former regulators and antitrust experts, I believe that the latter is the best course.

Thus, the XM and Sirius Satellite radio merger should be approved only if it is subject to the following three conditions:

- the new company makes available pricing choices such as tiered programming.
- the new company makes 5% of its capacity available to non-commercial educational and informational programming over which it has no editorial control.
- the new company agrees not to raise prices for its combined programming package (as opposed to each individual company's current programming package) for three years after the merger is approved.

Two other points warrant mention here. The first is our strong opposition to any merger condition involving limitations on the ability of consumers to record these satellite radio services. Such a condition would be tantamount to repealing the Audio Home Recording Act, which specifically protects a consumer's ability to record digital music.

The second is to urge Congress and the FCC to permit satellite radio broadcasters to do more, and not less, local programming. Broadcasters' opposition to this merger and to satellite radio's provision of local traffic, weather and emergency information is not only incredibly hypocritical given their own current regulatory efforts to consolidate, but is anticompetitive in its own right. Even assuming that broadcasters take seriously their statutory duty to serve local communities with programming that serves their needs (and not just traffic and weather), there is no reason why, in 2007, *any* media service should have a government-granted monopoly over local programming.

Whether the Proposed Merger Would Survive Antitrust Scrutiny is a Close Call and Warrants Thorough Analysis

Let me say at the outset that I am not an antitrust expert. Luckily, I have several colleagues who are. After conferring with them, I can only conclude that the antitrust questions raised here are very complex and ultimately depend on information to which Public Knowledge does not have access.¹

¹A former official of the Department of Justice's Antitrust Division apparently agrees with this assessment. See Statement of Charles E. Biggio, Wilson, Sonsini, Goodrich & Rosati PC, *Concerning Competition and the Future of Digital Music*, Hearings before the House Antitrust Task Force of the Committee on the Judiciary, 110th Cong., 1st Sess. (2007), available at <http://judiciary.house.gov/media/pdfs/Biggio070228.pdf>. ("Right now, we do not have all the facts necessary to determine the legality of the merger").

Take, for instance, the critical question of what would be the relevant market. If one views the relevant product market solely as satellite delivered radio service, the proposed transaction could be characterized as a “merger to monopoly,” which would strongly suggest outright rejection. Some of my public interest and academic colleagues, whom I respect enormously, do just that. For instance, the satellite radio broadcasters are the only services that provide listeners with certain programming, available at both high quality and from a mobile device. The satellite services also provide the only continuous national market for certain types of broadcasting – for example, only on satellite radio can a New York Mets baseball fan listen to the team’s baseball games anywhere in the nation, or even as one drives from state to state.

On the other hand, if the market is defined more broadly to include a wide variety of radio, mobile, and multi-channel music services, a regulator might reach a very different result. Indeed, XM and Sirius’ services overlap with and have effects on several different services (including video, if you include their feeds of cable shows). Competitors in this broader market would include over-the-air broadcast and HD radio, Internet radio services, cable (and DBS) radio, and wireless phone music and services like Sprint Radio, MobiTV, and V-Cast, as well as podcasts that can be downloaded onto MP3 players.²

A more broadly-defined market would include all of the services to which consumers would readily turn if satellite radio prices were raised. Anecdotal evidence

² Moreover, it appears that Sirius and XM may soon no longer be the only satellite radio providers. Slacker, a new service, is slated to begin delivering music to consumers via satellite in the near future. *See, e.g., Start-Up Launches 'Personal Radio' Service*, ASSOCIATED PRESS, Mar. 14, 2007, available at <http://online.wsj.com/article/SB117388069334336810.html>.

suggests that there is no shortage of theoretical substitutes. Still, we cannot ignore the fact that there are real differences between satellite radio and its competitors.

For instance, an audiophile colleague of mine is puzzled over my love of satellite radio because he receives all the new music he wants (for free) from Internet radio. In addition to providing highly diverse and specialized programming, Internet radio is becoming more mobile, and as a result is becoming a viable competitor to satellite radio.³ However, wireless services still may lack the higher-quality sound of satellite radio, and recent, drastic increases in the already-high webcasting royalty rates may drive a lot of Internet radio services out of business.⁴ Podcasts, which many satellite consumers may consider an easy substitute for satellite programming, are provided via a “pull” technology, more akin to “on-demand,” that the consumer picks and chooses, as opposed to satellite radio, which is a “push” technology in which the consumer may receive new content without specifically selecting it. And while broadcast radio is becoming a clear satellite competitor with multi-channel and with some commercial-free HD services, it is a local service that still hews to strict music playlists and is largely advertiser supported.⁵

³ A number of mobile carriers are currently providing streaming audio, video, and data to the mobile phone handsets they sell, generally on an exclusive basis between the wireless and content providers. This content is provided to the subscriber for a fee, typically in addition to wireless data fees, as these services are usually IP based. Verizon's VCast provides entertainment, sports, news, and weather video clips, music downloads, and mobile data; Verizon is also employing new MediaFLO technology to directly distribute content to handsets, apart from their data-based network. Clear Channel and MobiTV are exclusive providers of streaming audio and video content to Cingular subscribers. Sprint Mobile currently provides a number of streaming radio channels, from Music Choice, Rhapsody, and Sprint Radio; it is also aiming to provide more competition for high-speed data and competitive video streaming with WiMax technology.

⁴ See, e.g., Eliot Van Buskirk, *Royalty Hike Panics Webcasters*, WIRED NEWS, Mar. 6, 2007, <http://www.wired.com/news/culture/music/0,72879-0.html>

⁵ As evidenced by its appearance here today and its strong opposition to the merger, there is little doubt that the broadcast industry views satellite radio as a potential substitute.

Of course, a product needn't be identical to be substitutable.⁶ While intuitively it would seem that at least some of these competitors could act as substitutes, the important part of this question is not whether consumers can conceivably switch, but if they will, given the switching costs. Evidence of past pricing behavior⁷ and data on how and why consumers choose to spend their money on satellite radio would be most helpful to answer this question.

In the end, whether or not the merger is approved should depend upon its effects for consumers and for the market. We look forward to the antitrust authorities' thorough analysis of the merger's impact on consumers.

The Proposed Merger Would be in the Public Interest if it is Subject to Conditions Which Promote Diversity, Preserve Consumer Choice and Keep Prices in Check

Even if the merger survives initial antitrust scrutiny, significant competitive concerns remain. Since any merger would be premised on the ideas that consumers would automatically be better served through better prices and/or program diversity, it makes sense to ensure that these effects will in fact come to pass. Therefore, the public interest would be served only by permitting the merger subject to conditions that promote diversity, preserve consumer choice and keep prices in check.

⁶ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956). Although each of these products differs in the technical and legal details of how a user receives audio content, the various products are still competitors to the extent that consumers could migrate from one to another due to a change in price.

⁷ One analyst argues that if XM and Sirius did constitute an entire market, there should be evidence that they are engaging in oligopoly-like behavior, and reaping similar profits. The fact that they are both losing money suggests otherwise. Blair Levin, Rebecca Arbogast, & David Kaut, *XM-Sirius Review: Government Approval Close Call But More Likely Than Not*, STIFEL NICOLAUS TELECOM, MEDIA & TECH Regulatory, Feb. 20, 2007.

I reach this conclusion for several reasons. First, over the past several years, both companies have consistently lost money and subscriber growth has slowed,⁸ which makes it less likely that they will take a chance on alternative programming or programming provided to under-served communities. For example, in 2005 XM dropped almost all of its world music channels, including one channel devoted entirely to African music. Around the same time it dropped its alternative Spanish music programming, opting for more popular Spanish fare. The desire to attract the largest number of listeners and the high fixed costs of operating a satellite service will make it difficult for each service, with its relatively small subscriber base, to take chances on alternative programming and/or lower prices. To the extent that the new company will eliminate duplicative channels, there will be more capacity for new and diverse programming (which could even include video programming). Combining the subscriber base of the two companies could allow the new entity to expand the diversity of its programming to better serve niche preferences of the larger base. Increased program diversity would not only benefit satellite radio customers, it would likely encourage competitors such as broadcast radio to provide more diverse programming.⁹

Second, consumers would be served by gaining access to channels that they could not receive unless they subscribed to both services. No longer would a consumer have to

⁸ See, e.g., Craig Moffett, *XMSR and SIRI: Where to from here?*, BERNSTEIN RESEARCH, Feb. 20, 2007, 8-13 (showing projected losses and declining net subscriber growth for both companies). See also Richard Siklos and Andrew Ross Sorkin, *Merger Would End Satellite Radio's Rivalry*, N.Y. TIMES, available at <http://www.nytimes.com/2007/02/20/business/media/20radio.html> (noting combined \$6 billion in losses and slower-than-expected growth). One commentator has surmised that many consumers have hesitated to subscribe to satellite radio services "because they didn't know which company would survive." James Surowiecki, *Satellite Sisters*, THE NEW YORKER, Mar. 19, 2007

⁹ See Surowiecki.

choose between Major League Baseball and the National Football League, Martha Stewart and Oprah or National Public Radio and XM Public Radio (which features the still-popular former NPR personality Bob Edwards). In addition, as discussed below, we would urge the FCC to permit the new company to provide increased local programming, including news and public affairs, which would directly compete with over-the-air broadcast radio.

However, the magnitude of this merger indicates that it will increase market concentration to some substantial extent. Existing satellite subscribers may have significant switching costs to other services, and will certainly have no perfect substitutes. In order to ensure that the efficiencies from the merger will in fact result in greater program diversity, increased consumer choice, and better pricing, the merger should only be approved subject to the following three conditions:

- *Consumer Choice.* The new company should make available to its customers tiered program choices. For example, the company could make a music tier or a sports tier available to consumers, which would cost less than subscribing to the entire service.
- *Non-commercial Set-Aside.* The new company should make available 5% of its capacity for noncommercial educational and informational programming over which it will have no editorial control. There is precedent for this kind of non-commercial set-aside. Section 335 of the Communications Act requires Direct Broadcast Satellite providers to “reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.”¹⁰ This would ensure a diversity of programming choices and would permit programmers that would not normally have access to a national service to do so. As with the DBS set-aside, the new company could not fill it with programmers already on its system, and no non-commercial programmer would be able to control more than one of these channels.

¹⁰ 47 U.S.C. § 335(b)(1).

- *Three-Year Freeze on Price Increases:* Because of the expected gains from the merger and because competing services are still nascent, the new company should be prohibited from raising prices for three years after the merger is approved. This price freeze should apply to the combined programming package of the new entity, and not just to the current service of each individual satellite radio provider.¹¹

In addition, the FCC should determine whether the new company should divest all or some of the extra 12.5 MHz of spectrum that it will have as a result of the merger.

There may be no reason for the new company to control double the spectrum that the individual companies have today.

There is a belief among some of that if this merger is approved, then no other merger involving digital media will ever be denied. But that need not be the case if the antitrust authorities and the FCC are clear that the merger is being approved based upon very specific facts and circumstances. This merger involves a national service that has become a luxury item for less than five percent of Americans. As such, approval should have no impact on any questions about any proposed consolidation of local broadcasters.

This Merger Should Not Be Conditioned on any Limits on Consumers' Right to Record Satellite Radio

For the past 18 months, the recording industry and XM Satellite Radio have been engaged in a battle over whether XM should pay an extra licensing fee for selling a receiver that allows consumers to record blocks of programming and disaggregate it into individual songs. In the alternative, the recording industry has sought to have XM embed

¹¹ Ever since Sirius CEO (and presumptive CEO of the new company) Mel Karmazin promised that the combined company would not raise prices for its service at a February 28 hearing before the House Antitrust Task Force, questions have been raised by FCC Chairman Martin and others about exactly what service would be encompassed in the proposed price freeze. Stephen Labaton, *FCC Chief Questioning Radio Deal*, NEW YORK TIMES, March 7, 2007, available at <http://select.nytimes.com/search/restricted/article?res=F10816FB3E550C748CDDAA0894DF404482>

technological protection measures that would prohibit this activity. This dispute is the subject of an ongoing lawsuit in the Second Circuit¹² and pending legislation in the Senate.¹³

Public Knowledge is concerned that the recording industry will attempt to use the merger to limit consumers' ability to record satellite radio transmissions. Consumers have been permitted to record radio transmissions since the invention of the tape player, and that ability is specifically protected under the Audio Home Recording Act, 17 U.S.C. § 1001 *et seq.*, which prohibits any copyright infringement action

based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or *based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.*

(Emphasis added.)

The record companies have questioned whether the Audio Home Recording Act is in need of revision and repeal in light of changing technologies. While this might be a legitimate question, the place to ask that question is before Congress, not in the context of a merger. Moreover, to the extent that such a condition might be sought at the FCC, the federal courts have already ruled that the Commission has no power to require particular technological design mandates in the absence of express Congressional authority.¹⁴ Nor does the FCC have the power to require XM to pay a licensing fee in exchange for the ability to sell such receivers.

¹² See *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, No. 06 Civ. 3733 (S.D.N.Y. Jan. 19, 2007).

¹³ Platform Equality and Remedies for Rights Holders in Music (PERFORM) Act of 2007, S.256, 110th Cong. (2007).

¹⁴ *Am. Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

The Broadcast Industry's Opposition to the Merger is Hypocritical and Anticompetitive

Claiming that it “fully supports competition on a level playing field,” the National Association of Broadcasters opposes this merger for a variety of reasons, including that it would result in “state-sanctioned, monopoly control over the 25 MHz of spectrum allocated to satellite radio service,” that it “will not provide sufficient...public interest benefits,” and that it is “a government bailout for questionable business decisions.”¹⁵

There are many delicious ironies in the NAB's opposition to this merger,¹⁶ but perhaps the most salient to this discussion is that as we speak, the broadcast industry is seeking FCC relief in order to consolidate. And perhaps the primary rationale for requesting that relief is the supposedly uncertain and deteriorating financial state of the broadcast industry.¹⁷

It is no secret that the broadcast industry is opposing this merger for the purpose of obtaining conditions that would further limit satellite radio from providing local programming, including weather, traffic and emergency information. Indeed, it has

¹⁵ Statement of David K. Rehr, President and CEO, National Association of Broadcasters, *Concerning Competition and the Future of Digital Music*, Hearing before the House Antitrust Task Force of the Committee on the Judiciary, 110th Cong., 1st Sess. (2007), available at <http://judiciary.house.gov/media/pdfs/Rehr070228.pdf>.

¹⁶ See Gigi Sohn, *From the Unmitigated Gall Department*, PUBLIC KNOWLEDGE, <http://www.publicknowledge.org/node/836>. For example, despite its alleged desire for a “level playing field,” the NAB is actively opposing any and all efforts to require their members to pay the same “performance” fees to artists that webcasters and satellite radio pays, going so far as to call that fee a “performance tax.” See Gigi Sohn, *More from the Unmitigated Gall Department*, PUBLIC KNOWLEDGE, <http://www.publicknowledge.org/node/850>.

¹⁷ See, e.g., Shira Ovide, *Clear Channel's Profit Declines 54%*, WALL STREET JOURNAL, Feb. 24, 2007 at A6; *Earnings Preview: CBS Corp.*, ASSOCIATED PRESS, available at <http://www.chron.com/disp/story.mpl/ap/ft/4583381.html>, Feb. 26, 2007 (noting losses in the “troubled radio unit,” apparently caused by “stagnation in the overall radio market”); Comments of the National Association of Broadcasters, FCC Quadrennial Ownership Review, MB Docket No. 06-121 (Filed Oct. 23, 2006) 29-35 available at <http://www.nab.org/Content/ContentGroups/Legal/Filings/2006/QuadrennialOwnership2006Final.pdf> (“In sum, the combination of competition from cable, satellite, the Internet and other digital technologies is forcing broadcasters to fight even harder in the advertising marketplace.”).

recently renewed an effort to get Congress to place such limits on satellite radio.¹⁸ In other words, in order to save local radio, the NAB seeks to have the government prohibit more local radio.

Any conditions on the merger that would limit satellite radio from providing local programming would be profoundly anticompetitive, and should be rejected. Setting aside the question of whether "local" broadcasters take seriously their responsibility of serving their local communities with news and public affairs programming (not just traffic and weather), there is no rationale for shielding broadcasters from competing for local viewers and listeners. Indeed, rather than limit such competition, Congress and/or the FCC should permit satellite radio and other national services to provide more, and not less, local programming.¹⁹

Conclusion

The proposed merger of XM Satellite Radio and Sirius Satellite Radio raises complex antitrust questions. If these questions are resolved in favor of the merger, Public Knowledge believes that with conditions that protect consumer choice, promote diverse programming and keep prices in check, the transaction is in the public interest. I would like to thank the Subcommittee again for inviting me to testify and I look forward to any questions you might have.

¹⁸ See the Local Emergency Radio Service Act of 2007, H.R. 983, 110th Cong. (2007).

¹⁹ A condition limiting local programming via satellite radio should not be imposed even though Mr. Karmazin has testified that the new company would have no interest in providing such programming. Such a condition would limit the ability of any future satellite radio service or any entity that might in the future purchase the new company to provide local programming, giving broadcasters a "state-sanctioned monopoly control" over local programming.