Statement of

W. Russell Withers, Jr.

Owner

Withers Broadcasting Companies

Hearing on
"XM-Sirius and the Public Interest"

United States Senate
Committee on Commerce, Science, and Transportation

April 17, 2007

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On behalf of the National Association of Broadcasters

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Good morning Chairman Inouye, Vice Chairman Stevens, and Committee Members, my name is W. Russell Withers, Jr. The Withers Broadcasting Companies own and operate 30 local radio stations and six television stations in seven states. I am 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 this morning could not be simpler. The proposed merger to monopoly of XM Radio and Sirius Satellite Radio must be rejected. A monopoly in satellite radio would clearly harm consumers by inviting subscription price increases, stifling innovation and reducing program diversity. This monopoly would also jeopardize the valuable free over-the-air, advertiser-supported services provided by local radio stations. Free, over-the-air broadcasters are currently investing in new technologies, including digital audio broadcasting, which will enhance their stations' competitiveness and ability to serve local communities and audiences. All local stations ask is for a fair opportunity to compete in today's digital marketplace on a level playing field.

To Preserve A Fair And Level Competitive Playing Field, A Government-Sanctioned Satellite Radio Monopoly Must Be Rejected

Local radio stations are embracing the future by investing significant financial and human resources in new technologies, including high definition (HD) digital radio and Internet streaming, so that we can continue to compete in a digital marketplace and improve our service to local communities and listeners in myriad ways. For example, HD radio offers crystal-clear audio; the ability to air multiple free over-the-air programming streams; and the capability to offer additional services, including wireless data enabling text information such as song titles and artists or weather and traffic alerts. All local broadcasters ask is for the opportunity to compete in today's digital marketplace on a fair and level playing field. The proposed merger to monopoly of XM Radio and Sirius Satellite Radio must accordingly be rejected.

Plainly stated, 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 state-sanctioned monopoly with an absolute barrier to entry by any other competitor. Currently, XM carries over 170 channels of audio programming, and Sirius offers over 130 channels. A combined satellite radio entity would thus control approximately three hundred channels of radio programming in every local market in the United States, without any realistic check on its ability to assert market power. Even the largest cities, such as New York and Los Angeles, do not have anywhere close to 300 terrestrial radio stations, and smaller communities have a mere fraction of this number of stations, which, of course, are not all controlled by the same entity.

The drawbacks of a monopoly in any industry are clear. Monopolists have the ability to raise consumer prices with little constraint, to discriminate, and to otherwise

engage in anti-competitive practices. They need not compete with other providers to offer 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 the proposed merger to monopoly in the market for national, multichannel mobile audio programming services.

The XM/Sirius Merger Will Create A Monopoly In The Marketplace

XM and Sirius claim that they would not be a monopoly if they combined, but just one more competitor providing audio services. The companies would have Congress, regulatory agencies and consumers ignore the fact that a merged XM/Sirius would be the only licensee of all 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 monopoly power to the detriment of local free over-the-air radio stations, which must sell advertising based on the numbers of listeners they attract. There is no doubt that the effect of the proposed combination "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

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

stations can offer only a few multicast programming streams, in comparison to the hundreds controlled by XM and Sirius.

As a subscription service with hundreds of channels, satellite radio can also offer highly specialized channels that broadcasters who must "sell" their audiences to advertisers would be economically unable to offer. Sirius, for instance, offers an "Elvis Radio" channel airing all Elvis Presley all the time, while XM has a channel devoted solely to movie soundtracks. 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. XM, for example, 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 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. For all these reasons, local terrestrial radio broadcasting is not a substitute for national multichannel satellite radio, and consumers regard these services as distinct.

Indeed, when initially authorizing satellite digital audio radio service (DARS) in 1997, the FCC itself recognized that satellite radio, with its national reach, offers "services that local radio inherently cannot provide."[2] 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 older who are outside the 50 largest Arbitron radio markets (with the largest number of radio stations).

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

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.[3] 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.[4] Simply put, only XM and Sirius compete in this national, multichannel mobile radio market, and they are proposing to create a 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 instance, 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 customers 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 substantial differences between a nationwide, multichannel subscription audio service and local, advertiser-supported over-the-air radio service, it is highly unlikely that a consumer currently subscribing to satellite radio would drop their

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

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

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. After XM in 2005 raised its monthly price from $9.99 to $12.95 (a nearly 30 percent increase), the company continued to experience significant and rapid subscriber growth.[5]

The parties to the proposed merger have certainly not shown that terrestrial radio or other audio technologies such as iPods would have a constraining 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 restraints 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 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,

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[5] *See* Testimony of David A. Balto before the U.S. Senate Committee on the Judiciary, *The XM-Sirius Merger: Monopoly or Competition from New Technologies* at 4 (March 20, 2007).

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

[7] *Id*.

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.

It is also 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 as well as 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.

Perhaps most significantly, just last month the FCC treated satellite DARS as a separate market in a report to Congress on satellite competition.[10] The FCC defined this market as a "national" one, consisting of "satellite audio programming provided to persons within the United States for a fee." *FCC Satellite Report* at ¶¶ 55-56. Clearly, local radio stations are not participants in this market for national audio programming provided for subscription fees. Consistent with the FCC's analysis, a number of analysts

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[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 Rcd 20559, 20609 (2002).

[10] *See First Report* in IB Docket No. 06-67, FCC 07-34 at ¶¶ 55-57 (rel. March 26, 2007) (*FCC Satellite Report*).

have recently concluded that XM and Sirius are the only participants in the national multichannel mobile radio market.[11]

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 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 rule violations 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 expressly declined to allow 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 about 50 channels, not the 300 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

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[11] *See, e.g.*, Criterion Economics, LLC, Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc. at 8-33 (March 16, 2007) (*Criterion Economics Report*); The Carmel Group, White Paper, *Higher Prices, Less Content and A Monopoly: Good for the Consumer? The Proposed Sirius-XM Merger, Its Harmful Impact on Consumers, Content Providers and Performing Artists* at 3-6 (April 2007) (*Carmel White Paper*).

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.[12] 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 service to become monopolized by a single provider with control over the entire national market.

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 case in 2002, the Commission refused 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

[12] CD Radio Comments in IB Docket No. 95-91, at 17.

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.[13]

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.

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.[14] Without question, a merger to *monopoly* would be anticompetitive, inconsistent with antitrust principles and contrary to judicial decisions.[15] Or, to quote Sirius CEO Mel Karmazin, "it would be great if there was a monopoly, but the second best thing is a duopoly."[16]

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

[14] *See, e.g., FTC v. H.J. Heinz Co*., 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Cardinal Health, Inc*., 12 F. Supp.2d 34, 66 (D.D.C. 1998).

[15] *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).

[16] *See* http://blog.fastcompany.com/archives/2007/03/14/mel_karmazins_greatest_hits.html?partner=rss, quoting Mel Karmazin from Advertising Age (April 11, 2005).

XM and Sirius Will Be Able To Exercise Virtually Unlimited Market Power In The Closed National Radio Market, To The Detriment Of Consumers, Programming Suppliers And Other Audio Service Providers

The harms that would result from this proposed merger would be numerous and obvious, affecting content suppliers, consumers and other providers of audio services. Monopoly status would clearly enable the merged company to exert greater leverage over programming suppliers, who would be unable to play Sirius and XM off each other to obtain access to a satellite radio provider on favorable terms. If this merger is approved, the united XM and Sirius will be able to dictate price to programming suppliers on a "take it or leave it" basis.

Eliminating competition in the national mobile radio market would also greatly reduce incentives for the combined XM and Sirius to innovate, to the clear detriment of consumers. 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. An examination of the past programming and marketing initiatives of XM and Sirius demonstrates how consumers have benefited from competition between them.[17] Given the evident incentives for competitors to innovate, it is hardly surprising that, when

[17] For example, in 2004 after Sirius and the National Football League executed a seven-year agreement for carriage of NFL games, XM partnered with Major League Baseball in an 11-year agreement for carriage of baseball games. Similarly, in 2004 Sirius announced its deal with Howard Stern shortly after XM announced the return of "shock jocks" Opie & Anthony. Just a few days apart in 2005, XM announced a new women's talk channel, and Sirius announced the launch of the Cosmopolitan-branded women's channel. In early 2006, XM announced coverage of Big East college basketball and football, while Sirius announced the coverage of every game of the NCAA basketball tournament. Numerous other examples of competing programming initiatives can be cited. Similar competitive actions and reactions can be seen in the two companies' introduction of their first portable devices; in the launching of their "family discount" and "preferred plan" for additional subscriptions at discounted rates; in reaching agreements with various automobile manufacturers and rental car companies for the installation of their satellite radios; and in other promotional efforts.

declining to approve the EchoStar/DirecTV merger, the FCC 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, monopoly status would permit a merged XM/Sirius to raise subscription fees. Without the presence of a similarly-situated, direct competitor, a satellite radio monopolist could raise rates without any realistic competitive check on its actions. The FCC previously rejected the EchoStar/DirecTV merger due to concerns that consumers were "likely to suffer" harms from the "higher prices likely to result" from the proposed satellite television combination. *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20626. The courts have similarly stopped 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 providers of highly valued sports programming) to deal only with them, to the detriment of consumers and other distributors of audio programming, including local radio stations. 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 television, 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.

Beyond harming programming suppliers and consumers, a satellite radio monopoly would also have the incentive and the opportunity to engage in 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 with fewer channels 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.[18]

Furthermore, the merger parties' announced intention to pursue 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

[18] The combined XM/Sirius could also easily raise rates on other packages of programming, including ones most similar to the programming being offered today.

advertising markets. In addition, the satellite radio monopoly would not stop at national advertising. The extensive terrestrial repeater networks of Sirius and XM, when combined under common control, would offer substantial opportunities for entry into local advertising markets by a satellite radio monopoly. The rates for local advertising could be set artificially low with cross-subsidization from monopoly subscription fees. The valuable free, over-the-air service provided by local radio stations – which is entirely advertiser-supported – would be jeopardized by these developments. Ultimately, listeners and local communities would be the losers, as important services, including local news and emergency information, are eroded by a lack of advertising revenues to support them.

A merged XM/Sirius could moreover maintain any supra-competitive subscription prices or predatory behavior toward other audio service providers 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 mitigate 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.[19] This is extremely unlikely in the case of satellite radio, as it took XM and Sirius nearly 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

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

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 or other anticompetitive behavior 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.[20]

No Marketplace Or Business Conditions Justify The Risk Of Monopoly

There is no need to risk all these harms to consumers, content suppliers and other audio service providers by creating a national 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 demonstrates 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. *See Criterion Economics Report* at 3-4; 43. A very recent analysis by the Carmel Group

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[20] *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).

concluded that "there is no liquidity crisis on the horizon for satellite radio" and that "both Sirius and XM have enough cash to support their current business models." *Carmel White Paper* at 4-5.

In fact, Sirius and XM do not believe they will go out of business if the merger does not occur. Sirius CEO Mel Karmazin has publicly stated that he is "optimistic" about the company's future whether or not the merger takes place.[21] 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? And the fact that XM and Sirius experienced losses in the past as they first launched their

[21] Maxwell Murphy, *Karmazin Talks Sirius-XM Pact on Stern Show*, Dow Jones News Service (Feb. 26, 2007).

businesses has little bearing on either company's ability to make positive earnings going forward.[22] Just last month, the FCC reported that the two satellite radio providers had high growth rates for both subscribers and revenues and that revenues per user have begun to rise. *FCC Satellite Report* at ¶ 180.

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 and by utilizing the Internet for streaming and podcasting. 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 and should not be permitted.

XM and Sirius Have A Long History Of Violating FCC 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 or other audio service providers. 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 satellite 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,"[23] no such device is available to consumers today.

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[22] *Criterion Economics Report* at 46-47 (finding that "both Sirius and XM are expected to realize positive earnings in 2007").

[23] 47 C.F.R. § 25.144(a)(3)(ii).

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,[24] 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-commercial listeners who suddenly hear uncensored and unwelcome satellite radio programming on their car radios.[25] Local radio stations concerned about this interference to their services have forwarded numerous listener complaints to the FCC.

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

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[24] 47 C.F.R. Part 15.

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

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 merge, contrary to previous FCC decisions and decades of communications policy and antitrust law, would be, at the least, unjustified and unwise. Granting these companies a monopoly would likely further embolden them to pay even less attention to the rules of the road and to consumer welfare in the future.

The Proposed XM/Sirius Merger Will Generate No Public Interest Benefits And 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.[26]

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*,

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

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 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 satellite 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."[27] The courts 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.[28] Common sense further suggests that a monopolist such as the merged XM/Sirius would have little or no incentive to pass on cost savings to consumers. Thus, unsubstantiated claims about any consumer benefits flowing from the large cost savings that would supposedly result from the XM/Sirius merger are woefully inadequate to justify a combination reducing competition in a concentrated market. In fact, analysts have expressed considerable doubt that XM and Sirius would even be able to cut the claimed billions in costs by merging, let alone pass these cost savings onto consumers. An examination of the companies' cost structure (especially their long-term programming commitments) shows that achieving these cost

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

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

savings will be "very difficult and will take a long time, if it can be done at all."[29]

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 market equipment allowing customers to receive signals from both companies are not merger-specific;[30] there is nothing preventing them from undertaking such a project today except for the fact that they prefer to retain customers on the basis of sunk costs in equipment. Similarly, claims that the combined XM/Sirius will provide customers a credit if they choose to block adult programming are not merger-specific because XM and Sirius could provide these credits to their customers today if they wished.

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.

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[29] Michael Rapoport, *Cost-Cutting Claims Raise Static for Satellite Radio Deal*, Chicago Tribune (March 4, 2007) (citing analysts from Wachovia Securities and Oppenheimer & Co., who were highly skeptical about the "synergies" claimed by XM and Sirius).

[30] *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 programming and operations," and that the "companies plan to design equipment to let customers receive signals from both companies, which use different satellite technologies").

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. Courts have rejected mergers despite the merging parties' promises not to raise prices, observing that "the mere fact that such representations had to be made strongly support[ed] the fears of impermissible monopolization." *FTC v. Cardinal Health*, 12 F. Supp.2d at 67. If XM and Sirius feel obliged to make promises not to raise their subscription rates, this clearly shows that they expect to have the market power to do so following a merger.

Permitting a merger based on pricing conditions moreover 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. The antitrust enforcement agencies have in the past refused to condition merger approval on price regulation because they are not "price-regulatory" agencies, "compliance is difficult to monitor," and "competition is the proper driving force for pricing decisions."[31]

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

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[31] Mary Lou Steptoe & David Balto, *Finding the Right Prescription: The FTC's Use of Innovative Merger Remedies*, 10 Antitrust 16 (Fall 1995).

inconsistent with the Communications Act and with regulatory policy 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.* Regulation is just not a substitute for competition.[32]

Conclusion

Local broadcasters fully support vigorous competition on a fair and level playing field. Free, over-the-air 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 local communities. Congress should assure the maintenance of a competitively level playing field by clearly and expeditiously expressing its opposition to the proposed satellite radio merger to both the Department of Justice and the FCC.

For all the reasons I discussed in detail above, the proposed merger of Sirius and XM is simply anticompetitive. The creation of a monopoly in the closed national satellite radio market would injure consumers and programming suppliers, and impair the ability of other audio service providers to compete and to serve listeners. Because it would create a monopoly in violation of the antitrust laws, this proposed merger should be summarily rejected.

[32] *See, e.g., Nat'l Society of Professional Engineers v. U.S.*, 435 U.S. 679, 695 (1978) (antitrust laws reflect Congress' judgment that "competition will produce not only lower prices, but also better goods and services"); *Standard Oil v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").