

# **XM-SIRIUS MERGER AND THE PUBLIC INTEREST**

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## **HEARING**

BEFORE THE

### **COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE**

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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APRIL 17, 2007

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ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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## **XM-SIRIUS MERGER AND THE PUBLIC INTEREST**

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**TUESDAY, APRIL 17, 2007**

U.S. SENATE,  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:05 a.m. in room SR-253, Russell Senate Office Building. Hon. Daniel K. Inouye, Chairman of the Committee, presiding.

### **OPENING STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII**

The CHAIRMAN. This morning the Committee considers issues related to the proposed merger of the two satellite radio operators of the United States, XM and Sirius. While satellite radio is relatively new, it has grown rapidly. Today XM and Sirius provide audio entertainment services to more than 13 million Americans. These subscribers listen to satellite radio primarily while driving in their cars but some also listen in their offices, homes and on portable devices. Despite such successes, Sirius and XM now argue they should be permitted to merge into a single satellite radio provider, a result that was explicitly prohibited when the FCC adopted service rules in 1997.

In the eyes of satellite radio operators, such a restriction is out of date given the availability of programming via alternatives like dish over-the-air radio, MP3 players and other means of receiving audio entertainment. But to merger opponents, that argument rings hollow; in their view, satellite radio offers a unique collection of nationwide programming that as a whole cannot be effectively replicated. As such, these alternatives complement rather than compete with satellite radio. Thus to merger opponents, a satellite radio monopoly puts at risk the benefits of low priced and high quality service that only accrue from competing service providers.

This morning's hearing presents us with an opportunity to test these claims. While we welcome this discussion, I believe that the merger proponents in this case have a steep hill to climb. Indeed, given the public interest in promoting competition and maximizing a diversity of media outlets, we should be skeptical of claims that new technologies necessarily change the equation and provide competition sufficient to restrain monopoly power.

With that, I look forward to hearing from today's witnesses.

**STATEMENT OF HON. BYRON L. DORGAN,  
U.S. SENATOR FROM NORTH DAKOTA**

Senator DORGAN. Mr. Chairman, thank you very much. Thank you for allowing me to briefly make a statement now. I hope I can get back in time to ask some questions today. This is, I think, a particularly good panel. This is a very important topic. And Mr. Chairman, I believe it was last week I pointed out that there, in my judgment, has been precious little antitrust enforcement in this town for a long long time, not just this Administration but the previous Administration and beyond. Satellite radio is an appropriate hearing subject. It is a wonderful new service for consumers. I happen to be a subscriber so I listen to satellite radio, enjoy it, appreciate the offering it provides to the American consumers.

You mentioned in your opening statement that the licenses granted to two companies, Sirius and XM, nearly a decade ago, included a caveat that they not merge. They are now coming to us saying that a few short years later they wish to merge. I do not support the merger. I believe that merger by definition means less competition and where you had two competitors, you will have one company. I think it means less competition, more concentration. Mr. Chairman, you and the ranking members and others on this Committee know that I've spent a lot of time being very concerned about the concentration in broadcasting, television, radio, the galloping concentration in both areas, concentration with respect to newspapers, and that which we see, hear and read in this country is unfortunately these days controlled by a very few people. I'm very concerned about concentration. This is but one more step in those areas.

If I am back in time I will ask some questions. I had a chance to meet with Mr. Karmazin yesterday. He is a very able executive in that industry. I very much appreciated the opportunity to visit with him. But I do think there are a couple of important questions, one is the impact on the consumer of a merger in which competition is eliminated. And second, I will put up a chart that shows with respect to both XM and Sirius the content that they are providing. And because they are providing that content, I suppose, is one of the reasons that I and other subscribers are paying for that service every month. But one of the questions and one of the criticisms has been, what are they paying for all of this content?

I know that from published reports Oprah is getting \$55 million, but as you know from all of the rest of these, it's I believe Dale Earnhardt, Willie Nelson, Richard Simmons, Quincy Jones, Eminem, Snoop Dogg, Ellen Degeneres, Barbara Walters, and the list goes on and on. I think it would be important to understand, what are the contracts with respect to all of this content. Has that provided some tightening and pinching with respect to the revenues of two companies that then wish to become one?

We have I think a good panel and I appreciate that this hearing is timely and I think it's also very important. This is an important public policy question. I come down on the side of opposing the merger. Mr. Chairman, thank you.

The CHAIRMAN. Thank you very much,

Senator DORGAN. The Vice Chairman, Senator Stevens.

**STATEMENT OF HON. TED STEVENS,  
U.S. SENATOR FROM ALASKA**

Senator STEVENS. Thank you, Mr. Chairman. I apologize for being slightly late. I made the mistake of agreeing to make two appearances before this hearing. I'll cut it down to one next time. But I do think that this proposed merger between XM and Sirius presents an opportunity for us to learn more about this concept of audio entertainment. And we spent a great deal of time establishing a digital transition to assist public safety, and to create new broadband opportunities and there is a transition now obviously in radio.

I'm sure you've had, the same as I have had, some complaints from local broadcasters who have news, sports, weather and additional programming that they believe could be subject to harmful competition, that they can't survive with regard to this type of paid national satellite radio services. I appreciate the proponents of the merger visiting with me and my staff before this hearing. I still don't know the answer to this question. I look forward to trying to understand it better in this hearing, and I do know that we all want to know what's going to happen to the consumers in our own states, so I look forward to any comments that might be made about this and the impact of this on rural America. Thank you.

The CHAIRMAN. Thank you very much.

This morning we have five witnesses. I'm sorry.

Senator Lautenberg?

**STATEMENT OF HON. FRANK R. LAUTENBERG,  
U.S. SENATOR FROM NEW JERSEY**

Senator LAUTENBERG. Thanks, Mr. Chairman. The hearing is an important one and we are going to determine a lot about listening habits and fairness and equity with our consumers, and I listen to satellite radio and enjoy it. But there is no free lunch, obviously. It's a business. And the rise of satellite radio has offered a new and very powerful way to increase consumer choice for audio entertainment. But we have got to make sure that as satellite radio's audience increases, that consumers are not forced to face fewer choices and higher prices. We always talk in our country about the value of competition and what it does for product development and pricing. Now, if XM and Sirius merge, the combined company would provide service for nearly 14 million customers across the country.

But we have got to make sure that service after the proposed merger would be a consumer benefit, not just to the satellite radio companies themselves. Consumers must be able to have the service from both networks without having to invest in costly new equipment, without paying monthly rates far higher than the current established rate, \$12.95. And it's interesting to me how the two companies of interest were able to strike a price that was so perfectly, as we say, in tune, to use the vernacular.

We have also got to consider the merger's potential effect on free radio and local coverage. And as a former businessman, I understand the desire of the two satellite radio companies to grow their businesses. And they offer a product of great interest. But we've got to make sure that the principal interest is that of the public, and that consumers have more options and fairer pricing for the

products. So, Mr. Chairman, thanks very much for doing this. It's a very important subject and I look forward to the testimony of our distinguished witnesses.

The CHAIRMAN. I thank you very much, Senator. And as I was saying, this morning we have a panel of five great experts. Mr. Mel Karmazin, Chief Executive Officer of Sirius Satellite Radio; Mr. W. Russell Withers, Jr., President, Withers Broadcasting Companies; Mr. Gene Kimmelman, Vice President for Federal and International Affairs, Consumers Union; Ms. Gigi Sohn, President and Co-Founder, Public Knowledge; Mr. David Bank, Managing Director and Equity Research Analyst for RBC Capital Markets. And may I first recognize Mr. Karmazin.

**STATEMENT OF MELVIN ALAN "MEL" KARMAZIN, CEO,  
SIRIUS SATELLITE RADIO**

Mr. KARMAZIN. Good morning, Chairman Inouye and Vice Chairman Stevens, and members of the Committee. I appreciate this opportunity to talk to you today about the Sirius-XM merger and the benefits it will bring to consumers and the competition we face in the audio entertainment market. Prior to our announcement on February 19th, our board met many times with our advisors and we were told that in order for this merger to be approved, we would have to demonstrate two things, and you know Senator Dorgan and Senator Lautenberg said it. We need to demonstrate that this is good for consumers, and number two, that we have to demonstrate that it's not anticompetitive.

So I'm here to talk to you today about why these benefits of our merger are good for consumers and not anticompetitive. This Committee has a distinguished history of examining how changes in the media landscape affect consumers. So let me begin by summarizing the consumer benefits of our merger that we recently enumerated in our FCC filing.

We are confident that a combination of Sirius and XM is a big win for consumers. And here is why. Today Sirius and XM each provide consumers with one package for our service at \$12.95. Consumers who want programming from both services, such as the NFL from Sirius or Major League Baseball from XM, must buy two radios, and also must have two subscriptions totaling \$25.90 a month.

After the merger, the company will offer a programming package that offers the best of both services at a modest premium just over \$12.95, which is what the consumers today pay for one service. In addition, the new company will offer new lower priced packages with fewer channels combining music, entertainment, sports, information and more, at a price below \$12.95.

So in the area of pricing, I just described that the new company will offer a new package costing less than \$12.95 and a premium package that will cost modestly above \$12.95, but below \$25.90. No subscriber, no subscriber will pay more for the service that they now have. Today, consumers of both companies can block certain adult programming. The new company will provide a credit so that nobody will subsidize or pay for adult content that they don't want. Also to Senator Lautenberg's point, no consumer will have to buy a new radio. The radios that they currently have will not be obso-

lete, so lower prices, more choices for consumers demonstrate that the merger is in the public interest. All of the commitments are more than just words. We are prepared to at the appropriate time discuss with each of the regulators a guarantee as to how these points that I've mentioned can be conditions of our merger.

Now I'd like to turn briefly to the subject of competition. That's the second issue that the regulators are going to have to deal with. The audio entertainment market is a fiercely competitive, rapidly expanding market, and we are a very small piece of it. Satellite radio, XM and Sirius only have 3.4 percent of the audio market. Terrestrial radio remains the 800 pound gorilla in our market with nearly 14,000 radio stations, 230 million listeners—that 230 million listeners compares to our 14 million subscribers combined—and receivers that are in virtually every car, clock radio and home stereo in America.

Given our small share in a market brimming with competition and innovation, much of it free and universally available, our merged company will have to provide great service and pricing to continue to grow our business. To appreciate the intense competition in audio entertainment today, consider the extraordinary changes that have taken place in the 10 years since our licenses were granted. In 1997, there was no HD radio. Today there are over 1,100 radio stations providing coverage and Wal-Mart is selling HD radios. There was no Internet radio, and Internet radio is fast becoming aggressive in an area of WiFi. No iPods. There were no iPods in 1997 or MP3 players; nor were there any entertainment capable mobile phones.

Today all of these technologies not only compete with satellite radio, they also have backing from very resourceful companies with substantial positions. The rapid change in innovation, a very strong ubiquitous and free competition, and the small market share that Sirius and XM have together argues forcefully that our merger will not constrain competition. To the contrary, competition will require Sirius and XM to maintain both quality and affordability in order to maintain our growth.

In closing, we believe that a Sirius and XM merger will be good for consumers, offering more choices and better pricing. At the same time we believe that the audio entertainment market is robust, competitive, and teeming with innovation and will remain so after our merger. I look forward to answering your questions. Thank you very much.

[The prepared statement of Mr. Karmazin follows:]

PREPARED STATEMENT OF MELVIN ALAN "MEL" KARMAZIN, CEO,  
SIRIUS SATELLITE RADIO

Mr. Chairman,

Good morning. Thank you, Chairman Inouye, Vice Chairman Stevens, and members of the Senate Committee on Commerce, Science, and Transportation. I am grateful for the opportunity to talk with you today about how the merger of Sirius Satellite Radio and XM Satellite Radio will provide extensive consumer benefits and continue to promote competition in audio entertainment.

I am Mel Karmazin, the Chief Executive Officer of Sirius. Before I came to Sirius in 2004, I was president of Viacom and, before that, president of CBS. I have 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 and a 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, D.C., where the combined company will continue to have a significant presence.

I would like to talk today about some of the important benefits consumers will see as a result of the proposed merger. I also plan to discuss the extensive competition that satellite radio faces from a range of players in the audio entertainment market. As I will explain, this intense competition will remain after the merger is consummated.

#### **I. A Sirius and XM Merger Will Generate Concrete and Significant Benefits for Consumers**

*The Combined Company Will Offer Consumers More Choice at Lower Prices:* Today, Sirius and XM each provide consumers one service offering at one price—\$12.95 per month. Consumers have only a limited ability to tailor their service, and those seeking programming from both Sirius and XM must subscribe to both services for a combined payment of \$25.90 per month. The merger of Sirius and XM will enable the combined company to enhance these offerings through:

- *Better pricing.* The merger will allow us to *lower* prices. Consumers who want fewer channels than currently offered will be able to select one or more packages of channels for *less than* \$12.95 per month. These packages will include an attractive mix of music, news, informational, sports, children's, and religious programming.
- *More choices.* Sirius and XM customers will be able to access certain popular, previously exclusive programming of the other provider for a modest premium over what they are paying now.
- *Still more choices.* When interoperable radios are commercially available, consumers who want to have access to the *complete offerings of both companies* will be able to do so on a single device for significantly less than the current price of \$25.90.
- *Empowering consumers.* While customers of both companies currently have the option of blocking adult programming, the combined company will provide customers a credit if they choose to do so.

Despite the speculation to the contrary, the combined company will not raise prices. After the merger, consumers who want to continue to receive substantially the same channel lineup of either Sirius or XM may continue to do so at the same price—\$12.95 per month.

*The Combined Company Will Be Able To Provide Consumers More Diverse Programming:* Sirius and XM currently provide a wide range of commercial-free music channels, exclusive and non-exclusive sports coverage, news, talk, traffic and weather, and entertainment programming. However, there is significant overlap and redundancy in the channel line-ups of Sirius and XM. For example, 12 identical channels are available on both Sirius and XM. A further 75 channels overlap by genre—providing substantially similar programming.

In the long-term, the combined company will be able to consolidate certain redundant programming. The result ultimately will free capacity for more diverse offerings that are not currently available on either company's system, including expanded non-English language programming, children's programming, and additional programming aimed at minority and other underserved populations. Notably, this additional capacity also may allow the combined company to provide additional programming related to public safety and homeland security.

*The Merger Will Help Accelerate Deployment of Advanced Technology:* The combined company will be able to offer consumers access to advanced technology sooner than would otherwise occur. In particular, the marriage of the companies' two engineering organizations will ensure better results from each dollar invested in research and development. As a consequence, the combined company will be able to improve on products such as real-time traffic and rear-seat video. In addition, the combined company will be able to introduce new services, such as enhanced traffic, weather, and infotainment offerings; more rapidly and with greater capabilities.

*The Merged Company Will Be Capable of Commercializing Interoperable Receivers, Providing Greater Customer Choice and Convenience, While Also Protecting All Receivers on the Market Today:* This merger will neither interrupt nor affect cus-

tomers' use of their existing radios. After the merger, current subscribers may choose to continue to receive substantially similar service at the same price over their existing satellite radio. While no radio will become obsolete as a result of the transaction, we fully expect the merger to stimulate the development of new interoperable, highly portable, low-cost, and user-friendly devices.

*The Merger Will Create Operational Efficiencies and Safeguard the Future of Satellite Radio:* Satellite radio is a highly capital-intensive and expensive business. Sirius and XM each have invested over \$1 billion in their initial in-orbit satellites and over \$5 billion each in their businesses overall, and both continue to report significant operating losses. For the year ended December 31, 2006, Sirius reported a net loss of \$1.1 billion while XM reported a net loss of \$719 million. Both companies continue to report enormous operating losses. The proposed merger will allow Sirius and XM to achieve large-scale operational efficiencies that will help ensure that satellite radio can remain a strong, effective, and innovative audio entertainment provider. Importantly, significant portions of the savings achieved through the merger will be shared with customers immediately and in the long-term through lower prices and improved service offerings.

\* \* \* \* \*

Each of these important benefits is directly tied to the proposed merger and cannot be realized without it. I also would like to make clear that these commitments are more than just words offered to appease regulators. We view each of these benefits as a "win-win" that will make good business sense for Sirius-XM. At the same time that we will be able to save our customers money and offer them more attractive services, we will be strengthening our merged business. As I will explain in more detail below, satellite radio competes intensely with free terrestrial radio and a host of other audio entertainment providers. The key to getting more subscribers will not be to widen the price gap between free and what satellite radio charges. Instead, it will be to offer consumers a better value. We are prepared at the appropriate time to discuss each of the issues with regulators and to guarantee these benefits as a condition of our merger approval.

## **II. A Sirius and XM Merger Will Enhance Not Harm Competition**

### ***A. Satellite Radio Is a Small Part of a Highly Competitive and Ever-Expanding Market for Audio Entertainment***

The market for audio entertainment in the United States is robustly competitive and rapidly evolving. Sirius and XM compete directly and intensely with a host of other audio providers for consumer attention. As a result, although satellite radio has proven to be an appealing and popular new product, its market penetration remains quite limited. A recent Arbitron study found that Sirius and XM account for just 3.4 percent of all radio listening, spread out among the approximately 300 channels that the two companies currently offer. To provide the Committee with a sense of the fiercely competitive state of today's audio entertainment market, I would like to take a few moments to provide some details concerning some of our more salient competitors.

*Terrestrial Radio:* By any measure, "over-the-air" AM/FM radio is the most dominant form of audio entertainment. This is not surprising, given the ubiquity of the service: AM/FM radio is offered free of charge to all consumers and comes as a standard feature in virtually every vehicle, home stereo, and clock radio sold to U.S. consumers. Nearly 14,000 radio stations exist nationwide. Approximately 230 million Americans choose to listen to terrestrial radio each week. And much of the content available over terrestrial radio mirrors that provided by satellite radio.

*HD Radio:* The broadcast industry has made significant strides in rolling out digital services, and HD Radio technology is now spreading rapidly. Just last month, HD Radio received a substantial boost from the FCC. The agency issued an implementing decision that not only enables radio stations to broadcast higher quality digital entertainment, but also permits them to offer multiple streams of programming and data services over their existing channels. Significantly, the Commission's decision also allows radio broadcasters to provide digital subscription services on an experimental basis. This flexibility surely will intensify the competition between AM/FM radio and satellite radio, not only for listeners but also for subscription dollars.

Through the HD Digital Radio Alliance—a consortium of broadcasters that includes almost all major players, including Clear Channel Communications, CBS, and ABC Radio—the terrestrial radio industry has committed hundreds of millions of dollars to promoting this technology. That investment already has had proven effects. Approximately 1,200 HD Radio stations are already on the air, and hundreds more have licensed HD Radio technology.

In addition, the availability of HD Radio receivers is steadily and rapidly increasing. A year ago, there were only four or five HD Radio models available and the lowest price was \$599. Now there are 30 manufacturers of radios and price points under \$200. HD Radio is now available on all new BMW vehicles and in RadioShack stores. Wal-Mart, the Nation's largest retailer, recently announced plans to sell HD Radio receivers. Statements and materials from the HD Digital Radio Alliance clearly position HD Radio as a counterpoint to satellite radio.

*Internet Radio:* Internet radio is another formidable and fast-growing player in the audio entertainment market. A 2006 Arbitron study found that weekly listenership to Internet radio had increased 50 percent in just 1 year, and now approaches one in five Americans among key demographic segments. In one survey, 34.5 percent of Americans aged 15–24 mentioned online streaming as a *primary* source of music consumption in 2006 (up from 9.7 percent in 2004). Internet radio broadcasts have no geographic limitations and can provide listeners with radio programming from around the country and the world. Several Internet radio services, including Yahoo! LAUNCHcast and Pandora, allow users to create their own radio stations based on their listening preferences.

Internet radio, like HD Radio, is becoming a source for mobile audio entertainment as well. Slacker, a service unveiled just weeks ago, allows users not only to customize their music channels, but also to listen to them on portable devices, including in their cars; the service includes a free, advertising-based version as well as a subscription option. Various Internet radio offerings are already available on mobile phones, and Internet radio is expected to become widely available on portable devices, including car radios, by 2008.

*iPods and Other MP3 Players:* MP3 players, such as iPods, also compete with satellite radio for listeners. More than 116 million MP3 players have been sold. Like other audio competitors, MP3 players are highly mobile. There are now a variety of accessories available to play MP3 players in cars, through the vehicle's FM radio or tape deck. In addition, Apple recently announced that it has teamed with Ford, General Motors, and Mazda to provide iPod integration across the majority of their brands and models. With the addition of these models, more than 70 percent of 2007-model U.S. automobiles are expected to offer iPod integration. Many MP3 players also can be connected to online music subscription services, such as Real Network's Rhapsody, Napster 2.0 and Yahoo! Unlimited.

*Mobile Phones:* Mobile phones represent yet another significant and expanding means of enjoying audio entertainment. Approximately 75 percent of all Americans currently own a mobile phone, and the possibility of content delivery has not been lost on wireless carriers. Several major carriers are now offering audio entertainment options, and subscribers are taking advantage of them in dramatically growing numbers. For example, Sprint currently offers over 50 channels of radio and streaming video that subscribers can access via their devices for a monthly fee as well as music download capabilities for a one-time fee. AT&T and Verizon Wireless provide similar services. Approximately 23.5 million wireless subscribers currently own phones with integrated music players. This demonstrated consumer interest in music-capable handsets likely will skyrocket in a matter of months when AT&T and Apple make the Apple iPhone available for sale.

In addition, 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 and several cable companies is implementing a similar mobile entertainment platform.

The above list is by no means exhaustive. To be a competitor, businesses and technologies need not be exact copies of one another. There are numerous other audio entertainment options available today as well as a constantly growing array of choices in the works. Moreover, it is clear that these providers view themselves as being in direct competition with each other. In public filings and statements, various members of the radio broadcasting industry have emphatically stated that they compete directly with satellite radio and other forms of audio entertainment—a view that is underscored by the fervent opposition they expressed toward the pending transaction before the ink on the merger agreement was even dry. By the same token, Sirius and XM have listed a wide range of audio entertainment competitors in their SEC filings.

Just by way of example, NAB recently explained in the context of the FCC's ongoing media ownership proceeding that "local radio stations compete for listeners with other forms of audio delivery offering an almost unlimited array of content. iPods and other MP3 players, music services, podcasting and the Internet streaming of

U.S. and foreign radio stations literally provide content from around the world to listeners in each local radio market in America.” Such statements remove any doubt concerning the diversity and multiplicity of options available in the audio entertainment market today.

*B. Given the Widespread Competition in the Audio Entertainment Market, the Merged Company Will Not Have the Ability to Harm Existing Competitors or New Market Entrants*

In an attempt to cast doubt on the merits of a Sirius-XM merger, some broadcasters now appear to be reversing course and questioning whether satellite radio fully competes with AM/FM radio and other audio services. Pointing to differences between various audio services, some even try to make the case that satellite radio is a market unto itself and, therefore, that the proposed merger will create a “monopoly” that will have the ability and incentives to harm competition and consumers. Of course, this artificially narrow characterization conflicts with the expansive audio market that broadcasters publicly have described elsewhere.

But broadcasters cannot have it both ways. As the industry’s own prior statements make clear, the fact is that the market for audio entertainment is highly competitive now, and it will continue to be so after a Sirius-XM merger.

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. In reality, a combined satellite radio provider will be unable to exercise market power, let alone dominate the market.

As explained above, 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. The combined company will serve only a minor fraction of the consumers who purchase or use audio entertainment services. Given that Sirius and XM together account 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, customers can and do easily substitute other audio entertainment options for satellite radio, and this will continue to be the case after the merger. Indeed, many of the existing options are potentially more appealing and less costly to consumers. For example, AM/FM radio, as well as HD Radio, currently offers much of the same content as satellite radio *for free* to all consumers. And the ubiquitous nature of AM/FM radios provides consumers with broad exposure to the programming of broadcasters. The merged company’s prices will continue to be constrained by these inescapable facts. Similarly, online music subscription services and podcasting enable consumers to replicate most of the content and the user experience available through satellite radio. Moreover, Internet radio is capable of offering *more* variety and choice than any other option, and allows listeners to have substantial control over content selection and information about artists.

As a further illustration of the substitutable nature of various audio services, several audio providers actively have been expanding their capabilities so that their services more closely resemble satellite radio. For example, terrestrial radio has increased its format options while reducing commercials. HD Radio provides higher-quality sound that is comparable to satellite radio, as well as expanded genres and music formats. New automobiles increasingly come with input jacks that can be used to connect MP3 players or factory-installed iPod integration kits, similar to satellite radio. Likewise, vehicles soon will support Internet radio and music over mobile phones.

Given the existing and emerging capabilities of a range of audio entertainment services, it is not surprising that consumers routinely avail themselves of multiple options. In addition, many users of newer services, such as MP3 players and satellite radio, continue to rely on terrestrial radio. These factors will continue to exist, and to impact the behavior of satellite radio and other market participants after the merger.

Finally, aside from this existing, vibrant competition, entry by new competitors and expansion of current services will remain viable notwithstanding the pending merger. New wireless networks are already under construction, which will support mobile audio services via devices such as mobile phones and Internet radio over WiFi and WiMAX. In addition, there appears to be little limit to the growth of Internet radio and podcasting. Other types of spectrum also are available that are capable of supporting services comparable to satellite radio. For example, audio entertainment services similar to satellite can be deployed using the frequencies allocated to the Wireless Communications Service. Indeed, this spectrum originally was identified for satellite radio, but was reallocated pursuant to congressional mandate. The

FCC could authorize audio entertainment services using spectrum alternatives without regard to a satellite radio merger.

### **III. Conclusion**

Chairman Inouye, Vice Chairman Stevens, and members of the Committee, 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.

The CHAIRMAN. Thank you very much, Mr. Karmazin. May I now recognize Mr. Withers.

### **STATEMENT OF W. RUSSELL WITHERS, JR., PRESIDENT, WITHERS BROADCASTING COMPANIES; ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

Mr. WITHERS. Good morning, Chairman Inouye, Vice Chairman Stevens, and members of the Committee. My name is Russ Withers. I'm the owner of Withers Broadcasting Companies, which operates 30 local radio stations and six television stations in seven states, including Missouri and West Virginia. I'm testifying today on behalf of the National Association of Broadcasters, where I serve as Vice Chairman of the Radio Board and a member of the Executive Committee. And I'm here to voice opposition to the proposed merger of this country's only two nationwide satellite radio companies, XM and Sirius.

Satellite radio is a national radio service that provides hundreds of program channels to listeners across the country. There are only two such services and they compete against each other in the national marketplace. The undeniable fact is that XM and Sirius want government permission to take two competitive companies and turn them into a monopoly. 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 intramarket competition and to prohibit one satellite radio provider from ever acquiring control of the other, and there is no reason to change that position now. Currently, Sirius and XM occupy the entire 25 megahertz of spectrum allocated by the FCC for nationwide satellite radio service. With the new monopoly and a merged entity, they will continue to control this entire block of spectrum, preventing any new entrant from offering national satellite radio service and competing against their new monopoly.

These companies have claimed that no one should worry about this monopoly because local radio competes against XM and Sirius. Let's be very clear on this point. 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 that I operate in every day, markets like Cape Girardeau and Sikeston, Missouri. Local radio stations can only broadcast within their FCC defined coverage area. Local broadcaster signals are not nationwide, and they are not subscription-based. The national availability of satellite radio sets it apart from local broadcasters.

I operate in small and medium markets like Bridgeport and Clarksburg, West Virginia, where we are the voice of the community in times of emergency. In West Virginia this week it was the flood warnings; in Illinois and Missouri for the last 2 weeks it's been the tornado alerts. We are the voice of unique connection to our listeners that no other medium provides. XM and Sirius, by contrast, offer a prepackaged bundle of national, mobile, digital audio channels. KGMO in Cape Girardeau delivers outstanding local news, sports, and entertainment. Consumers, however, would never consider my station's local programming a comparable product to Sirius' 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. In fact, a recent FCC report and analysis on satellite market conditions shows a very healthy and competitive national satellite radio market. Following U.S. Department of Justice merger guidelines, the FCC defines the market participants as two providers: XM and Sirius. The report also finds the geographic aspect of this market to be national, subscription, and offering nationwide licensed choices. These are inherently different characteristics and services than that of local radio broadcasters.

I can understand why XM and Sirius would want a monopoly. But that does not mean that it is in the public interest. 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 paid to him just last year.

But even with these costs, XM and Sirius have made clear that they can succeed without a merger. For these reasons and others, local broadcasters strongly oppose a government sanctioned monopoly for satellite radio. Thank you.

[The prepared statement of Mr. Withers follows:]

PREPARED STATEMENT OF W. RUSSELL WITHERS, JR., PRESIDENT, WITHERS BROADCASTING COMPANIES; ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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, multi-channel 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.<sup>1</sup>

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.

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.

<sup>1</sup> Section 7 of Clayton Act, 15 U.S.C. § 18.

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.”<sup>2</sup> 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). 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.<sup>3</sup> 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.<sup>4</sup> 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 5 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 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 5 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.<sup>5</sup>

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 price increases are “a good option for us.”<sup>6</sup> 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.”<sup>7</sup> 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, there is an extremely low “churn” rate among satellite radio subscribers.<sup>8</sup> 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

<sup>2</sup> *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service*, 12 FCC Rcd 5754, 5760–61 (1997) (Satellite DARS Report & Order).

<sup>3</sup> XM Satellite Radio, Inc., Annual Report (SEC Form 10-K) at 2 (March 15, 2001).

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

<sup>5</sup> 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).

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

<sup>7</sup> *Id.*

<sup>8</sup> 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).

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.<sup>9</sup> 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.<sup>10</sup> 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 have recently concluded that XM and Sirius are the only participants in the national multichannel mobile radio market.<sup>11</sup>

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 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.<sup>12</sup> 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 eliminate a current viable competitor from every

<sup>9</sup>*EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20609 (2002).

<sup>10</sup>*See First Report* in IB Docket No. 06–67, FCC 07–34 at ¶¶ 55–57 (rel. March 26, 2007) (*FCC Satellite Report*).

<sup>11</sup>*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*).

<sup>12</sup>CD Radio Comments in IB Docket No. 95–91, at 17.

market in the country and would result in one entity holding the entire available spectrum allocated to the DBS service.<sup>13</sup>

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

*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.<sup>17</sup> Given the evident incentives for competitors to innovate, it is hardly surprising that, when 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

<sup>13</sup> See *EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20562, 20626, 20661–62 (2002) (*EchoStar/DIRECTV Merger Order*).

<sup>14</sup> 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).

<sup>15</sup> 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).

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

<sup>17</sup> 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 after 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.

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.<sup>18</sup>

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 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 2 years.<sup>19</sup> This is extremely unlikely in the case of satellite radio, as it took XM and Sirius nearly 4 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

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

<sup>19</sup>See U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* at 25–26 (April 8, 1997) (DOJ Merger Guidelines).

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.<sup>20</sup>

*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 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.<sup>21</sup> 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 businesses has little bearing on either company’s ability to make positive earnings going forward.<sup>22</sup> 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 con-

<sup>20</sup> 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).

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

<sup>22</sup> *Criterion Economics Report* at 46–47 (finding that “both Sirius and XM are expected to realize positive earnings in 2007”).

sumers' 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,"<sup>23</sup> no such device is available to consumers today. While both companies certified nearly 10 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,<sup>24</sup> 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 noncommercial listeners who suddenly hear uncensored and unwelcome satellite radio programming on their car radios.<sup>25</sup> 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 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.<sup>26</sup>

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 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."<sup>27</sup> The courts have rejected insufficiently documented claims

<sup>23</sup> 47 CFR § 25.144(a)(3)(ii).

<sup>24</sup> 47 CFR Part 15.

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

<sup>26</sup> *FTC v. Heinz*, 246 F.3d at 720, quoting Department of Justice Merger Guidelines, § 4.

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

from merger parties that cost savings resulting from efficiencies would actually be passed on to consumers in the form of lower prices.<sup>28</sup> 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 savings will be "very difficult and will take a long time, if it can be done at all."<sup>29</sup>

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;<sup>30</sup> 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.

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."<sup>31</sup>

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 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 Red at 20663. Because the

<sup>28</sup> See, e.g., *FTC v. Swedish Match*, 131 F. Supp. 2d at 172; *FTC v. Staples*, 970 F. Supp. at 1090.

<sup>29</sup> 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).

<sup>30</sup> 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").

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

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.<sup>32</sup>

### 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.

The CHAIRMAN. Thank you very much.  
Mr. Kimmelman?

**STATEMENT OF GENE KIMMELMAN, VICE PRESIDENT,  
FEDERAL AND INTERNATIONAL AFFAIRS, CONSUMERS  
UNION; ON BEHALF OF COMMON CAUSE, CONSUMERS UNION,  
CONSUMER FEDERATION OF AMERICA, FREE PRESS,  
AND MEDIA ACCESS PROJECT**

Mr. KIMMELMAN. Thank you, Mr. Chairman. Vice Chairman Stevens, Senator Dorgan, Senator Lautenberg. On behalf of Consumers Union, the print and online publisher of *Consumer Reports*, I appreciate the opportunity to testify this morning in opposition to this proposed merger. Consumers Union’s major goal for the policies related to media and mergers in the media sector is to have Congress continue to provide clear direction and promote regulatory action that will prevent efforts to consolidate media in ways that puts too much power in the hands of too few owners in this important sector of our economy.

The XM-Sirius proposed merger is just one small example of our concerns in these sectors, as Senator Dorgan outlined earlier. It may not be that important in the overall market sense, but is enormously important from the perspective of the logic that’s being provided by XM and Sirius to propose this merger, and to urge acceptance of this merger. Our concern is that that logic could open a floodgate of very dangerous consolidation across much more important media properties.

Mr. Karmazin’s pricing premises and logic reminds me of almost the same siren song that we heard in 1984, you may recall, when the cable industry came to you and said deregulate us because we compete with broadcast. We are small, we are very little in that market, and we have no incentive to raise our rates because we have to take on these big broadcasters, so please let us go. And they controlled themselves for 2 years and then, you may recall, from 1986 until you stepped in again in 1992, rates skyrocketed

<sup>32</sup> 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.”).

and anticompetitive behavior was flagrant. This is not a time to repeat that mistake.

Let me explain why I think there are some special attributes of this proposed merger that remind me of that behavior. Is there a broadcast audio market that includes satellite radio? Well, think about why people might buy XM or Sirius. People who are mobile. People who travel a lot, not just in the local community. They lose their local broadcast signals as they travel outside of their home territory or town. People who want a lot of baseball, a lot of NFL football, basketball, but not just their home team. They want a national package. Their local broadcaster can't offer that. iPods don't offer that. MP3 players don't offer that. They want unique niche programming that in any one market can't be supported by local broadcasts with advertiser support.

There is not a big enough market, but if you take small pieces, small communities around the country, there can be a national market for it. There is a unique need for probably 14 to 20 million consumer households here being served only by two companies that now seek to merge into one.

Now, is there complementarity? Is there overlap? Sure. People listen to their AM/FM radio, CDs in their cars. They listen to prerecorded music in conjunction with local broadcast radio, but it cannot serve these other needs. It does not and cannot. So they are similar in a few ways but not in the fundamental way that anti-trust policy or competition policy has to address to protect consumers. And certainly this merger cannot and shouldn't be allowed to satisfy the FCC's original mandate that there are two satellite radio licensees competing against each other. We shouldn't go back on that original promise. So there is a large segment of the consuming public that could be horribly harmed by this.

But really most importantly, I urge you to consider how the logic of comparing iPods, MP3 players and satellite radio would implicate other media transactions. Does that logic lead to more consolidation of television broadcasters? Of cable companies? Of newspapers and broadcast outlets? That's what we fear. It's hard to distinguish, from our perspective, the logic being applied to this proposed merger and those transactions that we know are waiting in the wings.

So in conclusion, we urge you to continue to promote more competition and diversity in media ownership, ensure that Federal agencies, competition and public interest agencies, reassert these strong principles and establish market guidelines that will prevent consolidation of media into the hands of a few dominant players. Unfortunately, this merger is just that type of consolidation. Thank you.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN, VICE PRESIDENT, FEDERAL AND INTERNATIONAL AFFAIRS, CONSUMERS UNION; ON BEHALF OF COMMON CAUSE, CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, FREE PRESS, AND MEDIA ACCESS PROJECT

Common Cause,<sup>1</sup> Consumers Union (CU),<sup>2</sup> Consumer Federation of America (CFA),<sup>3</sup> Free Press (FP),<sup>4</sup> and the Media Access Project<sup>5</sup> urge the Congress, the Federal Communications Commission and antitrust 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 longstanding concerns regarding excessive concentration in the media market and the effects of concentration on programmer access and consumer choice. But concerns regarding this merger extend beyond general media consolidation: 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, reduce consumer choice and impede competition. Simply put, this merger is not in the public interest.

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 over just a few years, this service is, in fact, a distinct product and could develop into a vibrant competitive market absent the merger. We believe the companies who seek to merge so soon after they began competing and offering consumers innovative new services; so soon after they demonstrated that subscription radio is attractive to consumers and could be more so with consumer-friendly pricing and improved equipment interoperability; 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.

XM and Sirius have not met that burden. 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 any of its purported benefits to consumers offset its anti-consumer and anti-competitive harms.

### **The Danger of an Overbroad Market Definition**

This merger raises the most fundamental issues in antitrust law and poses a substantial threat to consumers and competition policy generally. 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. A proper definition of the relevant product market proves that assumption to be

<sup>1</sup>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.

<sup>2</sup>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 goods, 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 non-commercial 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.

<sup>3</sup>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.

<sup>4</sup>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.

<sup>5</sup>Media Access Project (MAP) is a 35-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.

true. But an overbroad definition in this instance would create a devastating precedent for all media competition policy going forward.

The merging parties claim that the merger does not create a monopoly: the existence of cross-platform and intermodal competition means that *all* forms of distribution of audio content are interchangeable, even those that function merely as storage devices, and must be included in the market definition.<sup>6</sup> They assert that national subscription radio service competes, directly and indirectly, with a variety of partial substitutes. Through this overbroad market definition, the merging parties claim that they represent two small fish in a large ocean, rather than the only two fish in a small pond. Such an overbroad definition would have disastrous consequence for consumers of satellite radio as well as both for antitrust and public interest oversight in all media markets generally. By allowing the only two companies selling a specific type of media product to merge on the basis of erroneous claims of cross-platform or intermodal competition, the fundamental basis on which all public interest regulation of broadcast media rests is destroyed.

Concern about the danger of too broadly defining the product market is shared across the ideological spectrum. Gregory Sidak, former Deputy General Counsel of the FCC and Economist to the Council of Economic Advisers in the Executive Office of the President under the Bush Administration, argues:

“Broadcasting is more heavily regulated than other media. The FCC has justified that heavier regulation (and lower First Amendment protection) on the basis of four factors: the pervasiveness of broadcast speech, the scarcity of broadcast spectrum, the governmental interest in preserving viewpoint diversity over the airwaves; and the traditional goal of fostering localism in broadcasting. If, however, all aurally delivered media are totally indistinguishable from each other—as XM and Sirius claim—and this merger is permitted to proceed on that basis, then it will have been approved on a rationale that would make the inferior First Amendment state of broadcasting untenable. All content and structural regulation of the broadcast industry would be constitutionally indefensible.”

Scott Cleland, who describes himself as “a fervent and principled advocate of free markets and competition” reaches the same conclusion with respect to the antitrust laws:

“If the DOJ and the FCC endorse and enable an obvious government-created duopoly to become a monopoly, they would move the goal posts so far from existing precedent that they could not legally justify blocking any merger in the future . . .

. . . If the DOJ or the FCC approved this obvious attempt of monopolization, it would be open season on Federal antitrust competition policy.”<sup>7</sup>

The importance of understanding the broad implications of the theory that has been offered to justify this merger becomes even more apparent when we consider the position of the National Association of Broadcasters (NAB) on the merger. While the NAB argues in this case that the market should not be defined to include cross-platform and intermodal competition, in the media ownership proceeding ongoing at the FCC, the NAB argues exactly the opposite—a position we have flatly rejected and which is not supported by the evidence.<sup>8</sup> If antitrust authorities accept XM-Sirius’ overbroad definition of the mobile listening market, little foundation remains for rejecting NAB’s overbroad definition of the media market generally.

### **Merger to Monopoly**

Careful market structure analysis, rigorously applied in all circumstances—media ownership, merger review, and public interest oversight—shows that the overbroad definition of the market offered by XM-Sirius is simply wrong. Thus, as both Sidak and Cleland note, the broad definition of the product and geographic market that

<sup>6</sup>“Testimony of Mr. Mel Karmazin, Chief Executive Officer, Sirius Satellite Radio Regarding Competition and the Future of Digital Music, before the *Antitrust Task Force of the House Judiciary Committee*, February 28, 2007, SEC filing XX, FCC filing XX.

<sup>7</sup>Scott Cleland, “XM-Sirius merger is anti-competitive: The Emperor Has NO Clothes,” *Precursor Watch*, at 1.

<sup>8</sup>See Comments of Consumer Federation of America, Consumers Union, and Free Press, *In the Matter of 2006 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06–121, October 23, 2006.

XM-Sirius and their supporters<sup>9</sup> use is so obviously flawed that an unbiased analysis will easily conclude that the merger violates both the Sherman Act and the 1934 Communications Act as a merger to monopoly. 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. There are two, and only two, entities providing such a service. The alternatives the companies contend are substitutes do not possess this set of characteristics and therefore cannot be said to compete directly with the service. The two services deliver, and require consumers to purchase, huge bundles of well over 100 channels of programmed music, news and entertainment—programming that is nationally available.

We call to the Committee's attention the testimony of David Balto before the Senate Judiciary Committee.<sup>10</sup> Mr. Balto, a former and long-time attorney at the Department of Justice and the Federal Trade Commission who counts among his credentials litigation in opposition to mergers such as Staples/Office Depot, Time Warner/Turner, and Time Warner/AOL, examined the economic characteristics of the product that satellite radio companies sell. He cautioned that "[s]imply because certain products seem similar to the products being offered by the merging parties does not mean they are in the same relevant product market."<sup>11</sup>

Mr. Balto compared the XM-Sirius merger to the proposed Staples/Office Depot merger, which was blocked by the courts, noting that the court concluded that the relevant product market was the "superstore market" not the market for office supplies generally. The relevant product market was properly defined not just by the products being offered, but by the overall shopping experience. The same appropriate analysis applied to the XM-Sirius merger will produce a similar result. Using a similar analysis, Balto concluded that satellite radio is a distinct product:

"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."

The relevant market characteristics Mr. Balto identifies are:

- *Aggregating demand*: Satellite radio has the breadth and depth of programming because it can aggregate demand unlike other forms of audio entertainment;
- *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;
- *Product variety*: Satellite radio offers a far greater number of stations than terrestrial radio or even HD radio;
- *Diverse formulated programming*: Satellite radio formats program content to provide diversity, introduce listeners to new music and new forms of entertainment;
- *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.<sup>12</sup>

Evaluating the market alternatives according to Mr. Balto's criteria, it becomes clear why he came to the conclusion he did. The touted competitors are not competitors in any meaningful sense. There are distinct differences in product offerings, quality, listener experiences, mode of delivery, and regulation. None of the competing services and platforms shares the core characteristics of satellite radio. Each lacks one or more of the core defining characteristics of satellite radio: national service; programmed service; and mobile service.

<sup>9</sup>In congressional testimony, the only public interest group to support the merger has been Public Knowledge, see "Testimony of Gigi B. Sohn, President, Public Knowledge, Satellite Radio Regarding Competition and the Future of Digital Music, before the *Antitrust Task Force of the House Judiciary Committee*, February 28, 2007; "Testimony of Gigi B. Sohn, President, Public Knowledge Regarding The XM-Sirius Merger: Monopoly or Competition from New Technologies," *Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights*, March 20, 2007.

<sup>10</sup>Testimony of David A. Balto regarding The XM-Sirius Merger: Monopoly of Competition from New Technologies, *Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Consumer Rights*, March 20, 2007, at 1.

<sup>11</sup>*Id.*

<sup>12</sup>Balto, at 5.

### Terrestrial Radio

Product and market differences created by the varying licensing regimes for satellite and terrestrial radio must be considered when evaluating whether these entities are competitors. Entry into the satellite Digital Audio Radio Services (SDARS) market is restricted by the need to have a license to broadcast at frequencies that enable the service to be provided nationwide. During questioning at the Senate Judiciary Committee hearing last month, Sirius CEO Mel Karmazin conceded that it was unlikely that another satellite-based competitor would enter the market because of the high barriers to entry. Perhaps because of those barriers and the need to ensure competition existed, the original SDARS licenses were issued by the Federal Communications Commission under strict conditions that the two entities are not allowed to merge.

Differences in Federal licensing requirements also demonstrate the clear distinction between satellite radio and terrestrial radio. First, the different restrictions on the licenses demonstrate the market differences. Broadcast licenses require the service to be offered free of charge, requiring advertiser support. Local radio stations adjust their content to the audiences that the advertisers want to reach. Satellite radio licenses allow the licensee to support the service through subscription fees, offering largely commercial-free radio—a distinction that Sirius, in particular, widely promotes.<sup>13</sup> Second, satellite radio travels with the listeners no matter where they are, operating in a national market. But terrestrial radio is a local product; stations vanish as the listener crosses market boundaries. Third, broadcast licenses are subject to public interest obligations, while satellite services are not. As Greg Sidak noted, the licensing differences allow for different market segmentation between the two services.<sup>14</sup> Terrestrial radio will never be able to provide some of the programming currently offered on satellite not only because of content restrictions,<sup>15</sup> but also because its licensing requirements limit it to a small geographic market, preventing it from aggregating demand for the types of specialized programming offered on satellite radio. Thus programming on satellite radio tends to be more specialized and more diverse than that of terrestrial radio.

Thus, while it may be true that satellite competes with terrestrial radio in local terrestrial radio markets, terrestrial radio does not and cannot compete with satellite radio in *its* relevant market—the national market. Indeed, XM's tag line is "Beyond AM. Beyond FM. XM."<sup>16</sup> The emergence of HD radio does not change the analysis. In several important ways HD radio is an extension of terrestrial radio. It may solve the quality problem of terrestrial radio, but it carries the other weaknesses (as a competitor to satellite) forward. HD radio is still broadcast to a small local market. It is still subject to content regulation. It also has substantial consumer equipment costs, which traditional terrestrial radio does not. It may expand the capacity of an individual broadcaster a little, but the capacity of local radio still is minuscule compared to that of satellite radio providers.

### MP3 Players

iPods and other content storage devices require consumers to access, choose, and download individual selections; they do not provide programmed services. Though they have substantial capacity, the capacity pales by comparison to that of satellite radio. As Mr. Balto demonstrated, the cost of that limited capacity is expensive: "an iPod with 1,000 songs would have approximately \$1,000 worth of content or approxi-

<sup>13</sup> Sirius states "The biggest difference is that Sirius has 100 percent commercial-free music free 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 songs that you know and love, and many songs that we know you will love when you hear them for the first time. We also have 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." XM promotes on its website the availability of 69 commercial-free music channels.

<sup>14</sup> Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc., March 16, 2007, p. 6.

<sup>15</sup> For example, XM currently offers *Laugh Attack*, promoted as "Uncensored Comedy;" and Opie and Anthony, two radio personalities whose former on-air performances resulted in FCC fines. Both XM and Sirius offer *Playboy Radio*, and adult entertainment premium channel. Sirius offers *Raw Dog Comedy*, which provides uncensored comedy; *Maxim Radio*, promoted as "Girls, comedy, sports, music: *Maxim Radio* is the best thing to happen to men . . . since women!" and Howard Stern, the shock jock whose performances have resulted in FCC fines. Moreover, both services offer out of market sporting events unavailable on terrestrial radio: Sirius offers the NFL channel and XM offers the MLB Channel.

<sup>16</sup> [www.xmradio.com](http://www.xmradio.com).

mately six and a half years of the cost of an XM monthly service.”<sup>17</sup> Moreover, the iPod requires affirmative consumer action to access music; it lacks the programmed characteristics of satellite radio where music and information is pushed out to the listeners, exposing them to new content at the flip of a switch. Moreover, the diversity of programming and the capacity of the system which has enabled satellite radio to develop narrowly targeted niche programming lowers the cost of learning about new music. Listeners can go to the genre they’re interested in, programmed by a DJ who reflects their tastes, and hear an array of old and new content without commercial interruption. Thus, satellite radio becomes a complement for the iPod (assuming the iPod service provider has the desired song in its library). For example, having heard a new song on Sirius’s eclectic channel “*Sirius Disorder*,” the listener can download it to an MP3 player. Moreover, today, most MP3 players are used for listening to music. They do not generally deliver today programmed non-musical live content: news, sports, talk and other entertainment, which constitutes a substantial part of the programming content on satellite, 40 percent in the case of Sirius. In addition, content from satellite radio is delivered in real time; the listener does not download then listen to it later whenever they want as with iPods and other MP3 players and satellite radio. Finally, the mere fact that both MP3 players are mobile is not sufficient for these products to be substitutes. The merging parties could not with a straight face suggest that built-in CD players function as a substitute: the iPod is a similar device, only with greater storage capacity: it allows consumers to take music and other content they have already purchased and play it in their cars.

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 burgeoning market for mobile digital listening devices.

### Internet Radio

Internet radio suffers from many of the same problems as terrestrial radio. Much Internet radio is just a redistribution platform for terrestrial radio, which does not break the fundamental constraints of terrestrial radio. The business model still rests on advertising targeted, and content tailored, to the local market for which the terrestrial station holds a license. To the extent that some content is geographically specific (*i.e.*, a home town baseball team) Internet distribution may make it accessible to out-of-market listeners, but it is difficult for the distributor to monetize that broader audience. As a locally based advertising model, aggregation of demand is not possible. Thus, programming that requires a large national audience will be beyond the scope of terrestrial radio rebroadcast over the Internet.

Internet radio that is not based on the output of terrestrial broadcast radio (*e.g.*, music services offered by cellular carriers) suffers several problems. Its quality is questionable and its price is high. And both types of Internet radio also have yet to solve the problem of getting into automobiles, which is the primary market for satellite radio. Even as a stationary alternative, the product is limited by the need for access to broadband, wireless or wireline. Thus, it suffers from bandwidth constraints and substantially higher equipment and service costs. Satellite radio, on the other hand, is ubiquitously available to every consumer at significantly lower monthly costs.

As demonstrated above, the relevant product market for this merger is satellite radio itself. Thus, despite their contentions, the only alternative for XM is Sirius Radio; the only alternative for Sirius is XM. The merger is a merger to monopoly—a type of merger that is antithetical to the competition laws and perhaps the worst offense against the basic principle that competition is the consumer’s best friend. 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. That will be the result if regulatory and antitrust authorities accept the erroneous, overbroad market definition.

### The False Promise of Bank Shot Competition in Disciplining Prices

If this merger is approved on the basis that different audio platforms are available, consumers will lose: 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 re-

<sup>17</sup> Balto, at 6.

sult of relying on such competition in both merger and regulatory reviews has been rising prices and stagnation.

Cable television provides an appropriate example. In the 1980s, Federal policy-makers 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 has disciplined cable rates. The former had more limited channel capacity; the latter had greater channel capacity. It did not matter. The empirical evidence from the cable market is clear. Only head-to-head competition of products within the relevant market delivers clear relief from anti-consumer, anti-competitive pricing.

In the satellite radio service product space, we face a similar configuration of products. Congress, regulatory agencies and antitrust authorities should not be misled into believing that 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, will discipline prices any more than broadcast television, downloadable videos, DVD players, Digital Video Recorders and direct broadcast satellite have disciplined cable prices. The contention that the purported substitutes will discipline prices is even more suspect when one considers that the cost of satellite radio service has increased since the products were launched several years ago despite the presence of other mobile radio distribution systems. Free terrestrial radio and iPods have been around for a while, but their existence has not prevented increases in 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.

The merging parties argue 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, since redundant facilities lie unutilized. The monopolist can serve everyone while using fewer resources and the monopolist promises not to abuse the market power that would result. But without the stick of meaningful competition, 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 merging parties promise, in the short-term, not to raise prices for the services that consumers now receive. It is a hollow promise that fails to address the real harms of the merger. Time-limited price freezes today for yesterday's services fail to address the added costs to consumers over time that result when competition is absent. In addition, a short term price freeze does not compensate for the price declines that might otherwise occur if the two competitors continue to compete. In the absence of a merger, it is not clear why prices should not eventually fall below \$12.95/month for existing services as increasing subscribership drives down costs. In addition, with the loss of two head-to-head competitors, consumers will suffer from the gradual price creep that will likely occur over time, as in the monopolistic cable industry. Gradual increases, though less noticeable, have a dramatic adverse impact on consumers over time. A five to 10 percent annual increase over a period of years takes a significant bite out of the consumer's wallet, as any long-time cable subscriber will attest.

### **Consumer Choice Denied**

XM and Sirius assert that a significant benefit of the merger is greater consumer choice. A careful analysis demonstrates that such choice is badly circumscribed, comes at a cost, and is insufficient to compensate for the loss in choice consumers have now: the ability to choose services from two competitors.

First, XM and Sirius contend that eventually consumers will be able to receive content offered on both systems and in the short term, consumers will be offered some of the content offered on the other competitors system but unavailable from their current service. For example, subscribers currently able to get only the NFL or MLB channels will be able to purchase both. Note, however, that the purported increased choice will come at a cost. The merging parties do not claim to offer those

additional channels at the same cost of existing services. The parties offered concession to hold prices near current levels not only does little more than freeze pricing for yesterday's services, that promise does not apply to new packages that include the combined services of the two companies. 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 to receive premium channels. It is also reasonable to expect that to get those premium channels, consumers would likely be required to "buy-through:" to receive the premium channels at additional cost, consumers may be required to first buy the large basic package.

Second, despite XM and Sirius claims that channel capacity is not a limiting factor, significant concerns exist that to make those additional programming options available, the services will have to drop existing channels, including non-duplicative offerings, reducing consumers' choice, or alternatively degrade audio quality.<sup>18</sup> Channels with specific DJs consumers once enjoyed may be unavailable. In that case, there is little consumer benefit to the merger and substantial costs in terms of lost channel choice. And when dual platform receivers ultimately become available, enabling consumers to receive all channels from both providers, it is unclear what they'll cost and whether the parties will offer them to consumers at reduced or no cost.

Third, the merging parties assert that they'll offer consumers greater choice by offering specialty tiers or give them the ability to opt-out of channels and deduct the cost of those channels from their bill. This choice, however, could be available today. But instead, consumers in the satellite radio space are afflicted by the very same pricing practices that afflict cable consumers. 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.<sup>19</sup>

This merger promises to make matters worse, with large capacity systems joining to create larger consumer bundles at higher prices. The offer to give consumers greater pricing flexibility is not accompanied by promises that consumers won't be forced to buy-through to get specialty bundles, nor by assurances that the "cost" deducted from consumers for "opt-out" channels will actually reflect the cost of the programming for that channel. The cost to Sirius of Howard Stern's channel, which some listeners may find objectionable, is arguably higher than the cost of a music channel, where production costs are substantially lower. The merging parties' concession not only fails to provide the real channel-by-channel choice consumers demand, it is unlikely to provide any meaningful cost benefits.

The purported choice benefits simply do not compensate for the real choices consumers will lose: the choice between two head-to-head competitors. Today, consumers who want different options have the ability to switch providers, albeit at significant switching costs. But that possibility forces the two providers to continue innovating, improving their services, developing differentiating features like package flexibility, and competing on price. Because this is a unique product market, once the competition is eliminated, 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.

In addition, the merger harms independent content producers, DJs, artists and personalities who now have two competitors to play off one another when negotiating for carriage or "air-time." As we have seen in cable, concentration in distribution reduces access for content producers. Proposals made by some that, as a condition of the merger, some capacity should be reserved for independent non-commercial channels<sup>20</sup> may promote limited content diversity, but it does not compensate for the loss of bargaining power that independent *commercial* content producers will suffer when faced with the market power of a single distributor. At the end of the day, the loss of choice for content producer translates into fewer choices and less program diversity for consumers.

While the merging parties assert the benefit of the merger is greater consumer choice in channel programming offered by both parties, there has been little focus on the fact that it is the parties' own practices that have denied consumers this

<sup>18</sup>Charles Babington, "Radio Deal Could Face Technical Difficulties," *Washington Post*, Mar. 19, 2007, at D1.

<sup>19</sup>The marginal production costs are certainly every 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 a much narrower market segment.

<sup>20</sup>See *e.g.*, Sohn, *supra* note 9.

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 greater switching choice nor should it ease criticism that these parties sought to comply with only the narrowest interpretation of the commitment. 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, their choice is reduced. Today, we are asked to recognize choice benefits of a merger between two parties who have made concerted decisions to deny consumers choice that would otherwise have been available.

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 the Nation needs 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.

### **Conclusion**

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 now 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.

The CHAIRMAN. I thank you very much, Mr. Kimmelman. And now may I recognize Ms. Sohn.

### **STATEMENT OF GIGI B. SOHN, PRESIDENT AND CO-FOUNDER, PUBLIC KNOWLEDGE**

Ms. SOHN. Thank you, Chairman Inouye, Vice Chairman Stevens, and other members of the Committee for inviting me here today. The proposed merger invites a dilemma for public interest advocates. On one hand, the only two providers of satellite radio services which have vigorously competed over the past 5 years are seeking to consolidate, raising questions about the impact on prices and choice for consumers. On the other hand, this competition has left both companies weakened in a world where other multichannel music entertainment and information options are increasingly popular.

The salient question is this: How will consumers be better off? I believe that if the merger passes antitrust scrutiny, one strong company that is subject to conditions that protect consumer choice, promotes diverse programming and keep prices in check 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 multichannel music services, it is unclear how consumers would react if satellite radio prices were raised. Data on how and why consumers choose to spend their money on satellite radio would be helpful in making that determination.

And I must say, I don't agree with my friend and colleague's comparison of this merger to the cable industry looking at broadcasting in 1984, because a lot of people get cable and DBS to get their over-the-air stations. They see it as a necessary complement. It is not the case here. The markets are very different, so I just caution the Committee that that 1984 comparison has some holes in it.

Even if the merger survives initial antitrust scrutiny, 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 tiered program choices. For example, the company can make available a music or sports tier, 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 noncommercial programming over which it has no editorial control. This would resemble a requirement for DBS providers. Third, the new company should be prohibited from raising the price for its new consolidated programming package for 3 years.

In addition, policymakers should determine whether the new company should divest all or some of its extra spectrum it will have after the merger. There are several reasons why we believe that a properly conditioned merger would be in the public interest. First, consistent reports 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 the underserved. A combined subscriber base would allow the new company to distribute the fixed cost of the satellite system across a larger consumer base, reducing cost per subscriber and enabling new programming and lower prices. Second, consumers would gain access to channels they could not receive unless they subscribe to both services. Third, eliminating new and diverse programming.

I'll conclude by raising two other concerns. First, Public Knowledge opposes any merger condition involving limits on the ability of consumers to record satellite radio services. This would amount to repealing the Home Audio Programming Act which specifically protects a consumer's ability to record digital music. Two, local programming. Broadcasters opposition to this merger is hypocritical given their own regulatory efforts to consolidate. And I must say, it's interesting how the broadcasters always bring all of the folks who have 30 stations and 20 stations. I just can't believe that large group owners like Clear Channel with 1,200 stations do not com-

pete nationally. You have to look at syndicated programming to see whether there is an integration of demands. You don't look at the guy that owns 30 stations, you look at the people that own 1,200 and 1,300 and 1,400 stations, and with content and other regulatory restrictions, is itself anticompetitive. There is no reason why today any media service should have a government granted monopoly over local programming.

Senator Lautenberg, you asked about what the public interest is. The public interest is in more local programming, not less. And if you allow satellite radio to provide local programming you'll have that. Regardless of the current satellite radio company's intent to provide local service, others should not be barred from doing so. While broadcasters talk about a "level playing field" their supported programming limits an opposition to paying the same performance fees to artists that all other radio services pay, and reveal the industry's desire for government sanctioned competitive advantage. I look forward to your questions.

[The prepared statement of Ms. Sohn follows:]

PREPARED STATEMENT OF GIGI B. SOHN, PRESIDENT AND CO-FOUNDER,  
PUBLIC KNOWLEDGE

Chairman Inouye, Vice Chairman Stevens, and other members of the Committee, 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 Committee 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 devising—that a service that was intended largely to provide an alternative for the strict playlists and over-commercialization of broadcast 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 that is where the focus should be.

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, the slowing growth of their customer base and the increasing 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 percent 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 3 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 it is also anticompetitive in its own right. Even assuming that broadcasters take seriously their statutory duty to serve local communities with programming that serves local 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.<sup>1</sup>

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.<sup>2</sup>

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 suggests that there is no shortage of substitutes.<sup>3</sup> 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.<sup>4</sup> However, wireless services still may lack the higher-quality sound of satellite

<sup>1</sup>A 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; Before the Antitrust Task Force, Committee on the Judiciary, U.S. House of Representatives *Concerning Competition and the Future of Digital Music*, February 28, 2007. ("Right now, we do not have all the facts necessary to determine the legality of the merger").

<sup>2</sup>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., Associated Press, *Start-Up Launches 'Personal Radio' Service*, Mar. 14, 2007, available at <http://online.wsj.com/article/SB117388069334336810.html>.

<sup>3</sup>See, e.g., David Bank & Ryan Vineyard, *Wedding Bells Are Ringing For XMSR And SIRI*, RBC Capital Markets Industry Comment: Broadcasting and Cable TV, Feb. 20, 2007, 1, 4.

<sup>4</sup>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 V-Cast 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, Sprint Radio, and Sirius; it is also aiming to pro-

radio, and recent, drastic increases in the already-high webcasting royalty rates may drive a lot of Internet radio services out of business.<sup>5</sup> Podcasts, which many satellite consumers may consider an easy substitute for satellite programming, are provided via a “pull” technology, where the consumer picks and chooses content. In contrast, satellite radio 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 some commercial-free HD services, it is a local service that still hews to strict music playlists and is largely advertiser supported.<sup>6</sup> Of course, a product needn’t be identical to be substitutable.<sup>7</sup> 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 behavior<sup>8</sup> 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. If, for instance, the merger increases net efficiencies through the sharing of expensive infrastructure, or if the merger prevents one company’s assets from being lost altogether, then these factors would favor approval. We look forward to the antitrust authorities’ thorough analysis of the merger’s impact on consumers.

#### **The Failed 2002 Merger of DIRECTV and Echostar Does Not Provide a Basis for Denying the Merger of XM and Sirius**

Some argue that this proposed merger should be denied based on its similarity to the failed 2002 merger of the Direct Broadcast Satellite providers Echostar and DIRECTV. But there are significant differences between the two mergers, as well as lessons from the 2002 merger that caution a different result here.

The foremost difference between the two mergers is that consumers’ options for both audio programming and multichannel video programming have changed drastically over the past 5 years. Just 5 years ago, nobody had an iPod jack in their car; cellular phone companies did not provide mobile music services; and WiMax and other mobile Internet services were no more than gleams in technologists’ eyes. Similarly, in 2002 neither telephone companies nor webcasters were providing any significant multichannel video services. Given the changes in the multi-channel video market, I am not certain that the Echostar/DIRECTV merger would be denied today.

Second, there are important differences between multichannel video and audio services. Most important among these is that many, if not most, subscribers to cable and DBS buy these services to get better (or any) local TV reception.<sup>9</sup> Thus, “free” over-the-air TV has had little effect on the price of multichannel video services, because consumers do not see one as a replacement for the other, but rather see the multichannel services as a means to receive the free services. This is not the case with multichannel audio services. With a handful of exceptions, local radio stations are not carried on XM and Sirius, and consumers only subscribe to those services because they are willing to pay for content they believe that over-the-air radio does not carry. However, should satellite radio prices rise or competitors such as over-the-air radio provide cheaper and comparable content, there would be much less of a reason for consumers to continue to subscribe to XM or Sirius.

Finally, it could be fairly argued that denying the Echostar/DIRECTV merger did not benefit consumers. Supporters of that merger argued that one strong satellite TV company would provide better competition to incumbent cable than two weak

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vide more competition for high-speed data and competitive video streaming with WiMax technology.

<sup>5</sup>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>.

<sup>6</sup>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 substitute.

<sup>7</sup>*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.

<sup>8</sup>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.

<sup>9</sup>Before DBS providers were required to carry all local stations if they carried one such station, many rural residents would subscribe to get access to television of any kind, whether local or not.

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.

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, which goes a long way to explaining that industry's opposition to the merger.

**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. 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.

I reach this conclusion for several reasons. First, over the past several years, both companies have consistently lost money, and subscriber growth has slowed,<sup>10</sup> 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. Combining the subscriber base of the two companies would 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.<sup>11</sup>

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 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). Moreover, 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). 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 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 percent of its capacity for noncommercial educational and informational programming

<sup>10</sup>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, March 19, 2007.

<sup>11</sup>See, Surowiecki, *supra* note 10.

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 a Direct Broadcast Satellite provider to “reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for non-commercial programming of an educational or informational nature.”<sup>12</sup> This would ensure a diversity of programming choices and would grant access to a national service to programmers who normally would not have any. 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.

- *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 3 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.<sup>13</sup>

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. If, as Sirius CEO (and presumptive CEO of the new company) Mel Karmazin has testified, the new company will not be providing local programming even if it is given the authority to do so, 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 5 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 technological protection measures that would prohibit this activity. This dispute is the subject of an ongoing lawsuit in the Second Circuit<sup>14</sup> and pending legislation in the Senate.<sup>15</sup>

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

<sup>12</sup> 47 U.S.C. § 335(b)(1).

<sup>13</sup> Ever since Mr. 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*, N.Y. TIMES, Mar. 7, 2007, available at <http://select.nytimes.com/search/restricted/article?res=F10816FB3E550C748CDDAA0894DF404482>.

<sup>14</sup> See *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, No. 06 Civ. 3733 (S.D.N.Y. Jan. 19, 2007).

<sup>15</sup> Platform Equality and Remedies for Rights Holders in Music (PERFORM) Act of 2007, S. 256, 110th Cong. (2007).

no power to require particular technological design mandates in the absence of express Congressional authority.<sup>16</sup> Nor does the FCC have the power to require XM to pay a licensing fee in exchange for the ability to sell such receivers.

### **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.”<sup>17</sup>

There are many delicious ironies in the NAB's opposition to this merger,<sup>18</sup> 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.<sup>19</sup>

The Committee should take the NAB's opposition for what it is worth—the last in a very long history of broadcaster efforts to place regulatory roadblocks in the path of the satellite broadcast industry. This history started about 15 years ago when broadcasters tried to convince the FCC to impose content and other public interest obligations on satellite radio. It has continued with refusals by at least two broadcast groups to carry satellite radio advertising and by another broadcast group to insist that satellite radio carry advertisements when it programs channels on satellite radio.<sup>20</sup> Over the past several years, the broadcast industry has concentrated its efforts to constrain satellite radio at the FCC and in Congress through attempts to limit satellite radio from providing local programming, including weather, traffic and emergency information.<sup>21</sup>

It is no secret that one of the broadcast industry's main goals in opposing this merger is to obtain conditions that would, if not entirely prohibit satellite radio from providing local programming, prevent any increase in that programming. 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 limiting such competition, Congress and/or the FCC should permit satellite radio and other national services to provide more, not less, local programming.<sup>22</sup>

<sup>16</sup> *Am. Library Assoc. v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

<sup>17</sup> Statement of David K. Rehr, President and CEO, National Association of Broadcasters, Hearing on Competition and the Future of Digital Music, U.S. House of Representatives, Committee on the Judiciary, Antitrust Task Force, February 28, 2007.

<sup>18</sup> See Gigi Sohn, *From the Unmitigated Gall Department*, Public Knowledge Policy Blog, <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 <http://www.publicknowledge.org/node/850>.

<sup>19</sup> See, e.g., Shira Ovide, *Clear Channel's Profit Declines 54%*, WALL STREET JOURNAL, 1 FEB. 24, 2007 AT A6; ASSOCIATED PRESS, *Earnings Preview: CBS Corp.*, available at <http://www.chron.com/disp/story.mpl/ap/fn/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.”).

<sup>20</sup> See Sarah McBride, *Four XM Music Stations Will Start Running Ads*, WALL STREET JOURNAL, Mar. 8, 2006, available at <http://online.wsj.com/article/SB114178705518792190-email.html>; *Clear Channel's New Plan for Satellite Radio: Make it Worse*, TECHDIRT, Mar. 8, 2006, <http://www.techdirt.com/articles/20060308/0836259.shtml>.

<sup>21</sup> See the Local Emergency Radio Service Act of 2007, H.R. 983, 110th Cong. (2007).

<sup>22</sup> 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.

### **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 Committee again for inviting me to testify and I look forward to any questions you might have.

The CHAIRMAN. I thank you very much, Ms. Sohn. Mr. Bank.

### **STATEMENT OF DAVID BANK, MANAGING DIRECTOR, MEDIA AND BROADCASTING EQUITY RESEARCH ANALYST, RBC CAPITAL MARKETS**

Mr. BANK. Thank you. Good morning, Senator Inouye, Vice Chairman Stevens, members of the Committee. My name is David Bank. And I am the managing director—equity research for RBC Capital Markets, responsible for coverage of both the satellite radio and traditional radio broadcasting industries. XM Satellite Radio and Sirius currently have combined enterprise value including debt and equity securities of approximately \$11 billion traded in the public markets. I hope to put the proposed XM and Sirius merger into context with respect to the issues that these capital markets are focused on.

Of these issues, the first and foremost would be the potential synergies and subsequent savings that we believe are possible in an XM and Sirius merger. We estimate the value of these synergies to be somewhere between \$5 billion and \$6 billion. While it is not etched in stone, the extent to which the combined entity might pass savings and value creation on to consumers, we believe that there are three primary constituencies that stand to benefit financially from this \$5 to \$6 billion of savings.

The first are the employees of each company as the viability of the combined entity becomes stronger with greater long-term visibility. The second are the customers and consumers, which could probably benefit from greater innovation, more flexibility and pricing, and a more diverse selection of content. And third are the shareholders who will see value creation from increased long-term earnings potential.

Synergies would likely arise in two fashions. The first is rather straightforward, and it will stem from simply eliminating redundant network components, marketing costs and operating support functions.

The second is ultimately more difficult to quantify. It stems from a potential reduction in leverage that content providers such as sports, entertainment and news services, as well as automotive manufacturers previously exercised, when XM and Sirius were bidding separately for initial content and distribution contracts. These costs extracted from XM and Sirius in the form of fixed payments, variable revenue share payments and subsidies have been significant burdens, especially in light of slackening demand.

At the time most of the original agreements were signed, satellite radio technology was still in its infancy relative to consumer acceptance. Sirius and XM were very aggressively bidding against each other for content and distribution deals that were key to long-term survival against what we believe is a broader competitive backdrop that includes standard and HD terrestrial radio, iPods,

entertainment over cell phone, and Internet radio. In essence, the industry was competing against itself as well as these alternative distribution platforms. In addition, the demand for satellite radio subscriptions, particularly on the retail or non-automotive side, was expected to be more robust than it ultimately turned out to be.

As an illustration of this change in demand, look at the picture against a backdrop of higher fixed costs. While our current expectation for year end 2010 subscribers for the combined industry is approximately 26 million subscribers, our expectation for that figure when we made the estimate two-and-a-half years ago was closer to 33 million. So the expectation went from 33 million to 26 million by 2010.

Now, synergies are not going to occur overnight but rather over a period of years, with more expected to be realized in the latter half of the initial 5-year period after merger, because most agreements that the auto manufacturers and content providers have entered into are relatively long term. Most will not expire until at least 2011. In addition, in our view, the combined company will likely need to maintain two separate network operating architectures for several years as it continues to service existing customers.

The itemized details of these synergies by line item can be seen in our report published January 12th, 2007, but the bottom line is according to our estimates, these synergies could amount to value creation for XM and Sirius stockholders of approximately \$8 and \$1.73 per share respectively at the exchange ratios set forth in the XM and Sirius merger agreement. These amounts would correspond to premiums on the current equity prices of XM and Sirius of approximately 66 percent and 60 percent respectively, at Monday's closing prices, and this is probably the major focus of the capital markets. The combined company will almost certainly have greater resources to invest in technological innovation, leading to a more rapid development of improved products than either company would on a stand-alone basis.

As for implementation, that will be up to the management of the combined companies. We believe that the satellite industry is a viable one with or without this merger. However, we would note that as competition is increasing for the mobile entertainment consumer, as illustrated by the evolution of the iPod to the iPhone, broadcast audio and video over cell phones, MP3 integration into the automobile, broader adoption of over-the-air HD radio, we believe the industry will be in a much healthier and stronger position should the merger occur. In conclusion, I would like to note that RBC Capital Markets has at no time served as a financial adviser to either XM or Sirius. Thank you.

[The prepared statement of Mr. Bank follows:]

PREPARED STATEMENT OF DAVID BANK, MANAGING DIRECTOR, MEDIA AND  
BROADCASTING EQUITY RESEARCH ANALYST, RBC CAPITAL MARKETS

Good morning Members of the Committee and guests.

My name is David Bank. I am the media and broadcasting equity research analyst for RBC Capital Markets responsible for coverage of both the satellite and traditional radio broadcasting industries.

XM Satellite Radio and Sirius Satellite currently have a combined enterprise value including both debt and equity securities of approximately \$11 billion and I

hope to put the proposed XM and Sirius Merger into context with respect to issues that the capital markets are focused on.

Of these issues, the first and foremost of them would be the potential synergies and subsequent savings that we believe are possible in an XM and Sirius Merger. We estimate the value of these synergies to be somewhere between \$5 billion and \$6 billion dollars.

While it is unclear to us how, if at all, the combined entity might pass on savings and value creation to consumers, there are three primary constituencies that stand to benefit from the \$5–\$6 billion of savings financially: (1) the employees of each of the companies as the viability of the combined entity becomes stronger, (2) the customers which could potentially benefit from greater innovation, more flexibility in pricing and a more diverse selection of content and (3) shareholders, who will see value creation from increased long-term earnings potential.

Synergies would likely arise in two fashions. The first is rather straightforward and will stem from simply eliminating redundant network components, marketing costs and operating support functions.

The second is ultimately more difficult to quantify, but a clear driver, nonetheless. It stems from a potential reduction in leverage that content providers (*i.e.*, sports, entertainment and news service) as well as automotive manufacturers previously exercised when XM and Sirius were bidding separately for content and distribution contracts. These costs, extracted from XM and Sirius in the form of fixed payments, variable revenue share payments and subsidies, have been significant.

At the time most of the original agreements were signed, satellite radio technology was still in its infancy relative to consumer acceptance. Sirius and XM were very aggressively bidding against *each other* for content and distribution deals that were thought to be key to long-term survival against a broader *competitive backdrop* that included standard and HD terrestrial radio, iPods, entertainment over cell phones and Internet radio. In essence the industry was competing against itself, as well as alternative distribution platforms. In addition, the demand for satellite radio subscriptions, particularly on the retail side, was expected to be more robust than it ultimately turned out to be.

As an illustration of the change in the demand picture against a backdrop of higher fixed-costs, while our current expectation for year end 2010 subscribers for the combined industry is approximately 26 million, our expectation for that figure in late 2004 and early 2005 when we first published estimates for year end 2010 subscribers was closer to 33 million, a discount of approximately 20 percent.

Synergies will not occur overnight, but rather over a period of years—with more expected to be realized in the later half of the initial 5 year period after a merger because most agreements that the auto manufacturers and content providers have entered into are relatively long-term—most will not expire till at least 2011. In addition, in our view the proposed combined company will likely need to maintain two separate network operating architectures for several years as it continues to service existing customers. The itemized details and timing of these synergies by line item can be seen our report dated January 12, 2007, entitled—*XMSR and SIRI Should Act On The Urge To Merge . . . Now*.

The bottom line is that, according to our estimates, these synergies could amount to value creation for XM and Sirius stockholders of approximately \$8.00 and \$1.73 per share, respectively, at the exchange ratio set forth in XM and Sirius merger agreement. For further details on this analysis, please see our report of February 20, 2007 entitled, *Wedding Bells Are Ringing For XMSR and SIRI*.

These amounts would correspond to premiums on the current equity prices of XM and Sirius of approximately 66 percent and 60 percent respectively at Monday's closing price—and this probably is the major focus of the capital markets.

We believe that the combined company will almost certainly have greater resources to invest in further technological innovation leading to a more rapid development of improved products than either company would on a standalone basis. As for implementation, that will be up to management.

We believe that the satellite Industry is a viable one with or without this merger. However, we would note that as competition is increasing for the mobile entertainment consumer, (as illustrated by the evolution of the iPod to the iPhone, broadcast audio and video over cell phones and MP3 integration into the automobile, broader adoption of over-the-air HD radio), we believe that the industry would be in a much healthier and stronger position should the proposed merger occur.

In conclusion, I would like to note that RBC Capital Markets has at no time served as a financial advisor to either XM or Sirius.

The CHAIRMAN. I thank you very much, Mr. Bank, Vice Chairman Stevens.

Senator STEVENS. Thank you, Mr. Chairman. Mr. Karmazin, what happens if this is not approved?

Mr. KARMAZIN. If for any reason this merger is not approved, I believe that both companies continue to operate, that we have not made a failing argument case because we believe that both companies are viable. I think that competition would lessen, and I believe that satellite radio would be weaker than it should be. And part of the reason that the NAB is here to testify is obviously because they would like to see what you just said happen, because obviously the existing broadcasters that have HD radio and terrestrial radio do not want to see the merger happen because they don't want to see satellite radio be a better choice for consumers. Because if satellite radio is better for the consumers because we have lower prices and because we give the consumer more choices, that will impact terrestrial radio, so we will become a less good competitor and the NAB would have gotten their way if in fact the merger doesn't happen.

Senator STEVENS. I may be misinformed but I'm informed that people who have satellite radio, one or the other, also have over-the-air, and they are more high income people; is that right?

Mr. KARMAZIN. I think that in the case of terrestrial radio, everybody has an AM/FM radio in their car. So if you think of where radio is listened to, if you listen to your radio in your car, you have an AM/FM radio there. As far as the satellite radio customer, it cuts across all ethnic and all economic groups so that we have subscribers who are not, you know, at the very extreme ends of either of those spectrums, or are at both ends of the spectrum.

Senator STEVENS. But if an automobile has one satellite receiver it doesn't receive the other provider, right?

Mr. KARMAZIN. That's correct. And that's why it's such a disadvantage to the consumer. Because right now if you like Major League Baseball, let's use that as an example, and you buy a Ford vehicle, you have an exclusive service right now with Sirius so that you are unable to get that content that you would also like to have. So it's obviously part of the argument that we make as to why it's such an advantage to the consumer is that it's not just the lower price but the greater choice, so when you buy a Ford vehicle you might have the opportunity of having the NFL and having Major League Baseball.

Senator STEVENS. As satellite radio was developed, was it impossible to make just one set that received both?

Mr. KARMAZIN. One of the things that both companies had worked on, because as part of our commitment to the FCC that we would develop what they are calling an interoperable radio, would be a receiver that could have both services. And we have developed such a receiver and have made our proprietary intellectual property available to any manufacturer who would like to make it. There is no subsidy that is being given by XM or Sirius to subsidize that interoperable radio. That radio would cost a higher price in the market today than the consumer would be willing to pay.

And the reason, Senator, that the companies are not subsidizing the radio, whereas we do subsidize our other radios, is that when

you buy just a Sirius radio we would subsidize it because we get a subscription. It doesn't make very much sense for us to subsidize a radio that doesn't result in a subscription for us because if a consumer bought that interoperable radio and they chose to subscribe to our competitors or one or the other services, then we would not be getting a subscriber. What we have said is that as a result of this merger, that we would make those interoperable radios, or make that interoperable radio commercially available to consumers as a benefit to consumers as a result of this merger, so they could get the full content of both services.

Senator STEVENS. Mr. Withers, how much competition does the over-the-air broadcaster get from satellite radio now?

Mr. WITHERS. Well, the competition now, Mr. Vice Chairman, is the fact that they compete in all of our markets all the time. If we have a market with six radio stations in it, XM and Sirius have a total of approximately 303 channels, and yet the market that has six stations, that's all they have. If those stations, and let's say four of them are FM stations and four of them had full HD complement and they had three additional channels, that would be 12 more, and that certainly doesn't compete. That's a disingenuous argument that we would have competition face-to-face with 303 versus, you're talking about 18 or so.

They compete with us. We don't compete with them on a national basis. They were authorized as a national radio service and they are. I also can point out that the 1997 authorization for both satellite services required them to have an interoperable receiver and they should have had one on the market in my opinion a long time ago. Because if it served both, it was subsidized by the subscriber to Sirius, then Sirius would get that subscription rate, and if it was XM they would get it. But it would be a receiver that would pick up both and it would have certainly eliminated the Beta-VHS situation now where they are not compatible with each other.

Senator STEVENS. Mr. Kimmelman, do you see any consumer benefit from this merger?

Mr. KIMMELMAN. It's really hard to see, Senator Stevens. Even as they claim their major competitor is broadcast, local broadcast radio, think about whether the consumer would benefit from of getting a monopoly in satellite radio. Consumers pay nothing for local broadcast radio. It's free. It's advertiser supported. Satellite is not a competitor that is going to drive down the price of local broadcaster radio. It's already free. So it's really hard to see meaningful benefits there. And for the 14 million who already have satellite radio, or 20 million who will have it, to have one choice instead of two is an enormous harm. I hear a lot of promises and maybe you'd want to create a regulatory screen around those promises if you really wanted to move to monopoly, but if you're going to go that route why don't we take back half the spectrum. They don't need double the spectrum to offer a monopoly service. They were licensed to compete against each other. So if you want to change the model, you could go that way, but straight out whether this merger benefits consumers, it's very very hard to see any benefit.

Senator STEVENS. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Senator LAUTENBERG. This references the theory that they would like to have me here and I would have to pay for this. Oh my gosh. Well I used my good remarks already.

Mr. Karmazin, talking about the lower cost receiver, because it's said there is a breadth of these lower cost and higher cost receivers that presently could accept the two channels, and then if the merger went through, obviously the one. What about the quality of the reception on these? Are they—am I making myself clear here?

Mr. KARMAZIN. I'm not sure. Our service that we offer is a service that provides for excellent, almost CD quality kind of service. If you mean the sound quality from a point of view of the content quality that's available, you know, we have a full spectrum of content on both services, you know, ranging from NPR to *Radio Disney* to sports to entertainment kinds of programming. On our receivers, there are receivers that, you know what we have said, is for every single receiver that's out there today. So assume you went into Best Buy and you bought a Sirius or an XM radio a year ago and this merger happens, those receivers are not going to be obsolete. So every one of those receivers will still be able to work in the new service and what we will do, and what we have committed to doing is that if you bought an XM receiver, then we are going to be able to take some of the content from Sirius that you can't get today and make it available to you on that other receiver.

I know that this Committee, I think, had a hearing a couple weeks ago on Major League Baseball because baseball was not available on one platform. And what we are saying is that this merger is going to make more consumers have access to more content and get it at a lower price than they could without the merger.

Senator LAUTENBERG. The thing that I see that Mr. Withers, I think amplified, is whether or not the local interests are served. We in New Jersey have a particular situation with a channel whose license includes very specific obligations to provide local news service.

We have been attentive to that obligation and when the company announced that they were going to move their news operation to New York City, we said just remember, you have a license renewal coming up and we are going to have something to say about it. Well, they canceled that program. And the question is why, why couldn't these things, Mr. Withers, operate successfully together and just like any other selection you make about program content, and without impairing the local opportunity, the local broadcaster's opportunity group that you represent here, why wouldn't that permit you to operate side by side with this merged company and still protect your share of the marketplace?

Mr. WITHERS. As I understand the question, and I thank you for it, they are operating side by side as they are today, but they are not doing local programming, they are not doing local sales. And I know that Mr. Karmazin has indicated that he would be willing not to do either, but we are the ones that if there is a missing child and we have to put the alert out, the AMBER alerts, we do it. We are the ones that do the weather forecasts. We are the ones that do the school closings if the buses break down. And in some markets if there is a lost dog, a Dog Gone report, they have no interest

in doing that. But we compete against them every day for programming.

And they spend a lot of money on their programming and do a very good job, the way that they do it as a national programming service. And if we are going to exist as a local service and local broadcast service, which we are today and proud to be, then we have to have the economic base to do that. And if that's undercut, then you're left with a national service that really doesn't care about the local situations. They can't handle a tornado alert in southeast Missouri or in southern Illinois, western Kentucky, wherever, in Anchorage, if Anchorage were to get a tornado.

Senator LAUTENBERG. Does that compare to network services who also own local, or franchise local broadcasters, NBC, ABC, what have you?

Mr. WITHERS. Well, that's a good analogy, sir. The national network, their local affiliate then has the obligation to do that. But we are not local affiliates of XM or Sirius. We are totally, you know, it's a totally different ball game.

Senator LAUTENBERG. Right. But if there was a side, if there was side by side opportunity then that would not, kind of, resemble the situation—

Mr. WITHERS. Well, I don't think, and I'm not authorized to speak on this matter for the National Association of Broadcasters, but I was at a hearing the other day when Mr. Karmazin testified that they had lost \$6 billion with their business plan. I don't think we have any intentions of making an offer for XM or Sirius.

Senator LAUTENBERG. Well, I guess there are people who think that some of the content is worth an awful lot of money.

Mr. WITHERS. It—I think that—I'm trying to—I see where your thought process is on that.

Senator LAUTENBERG. I'm trying to be fair here on both sides.

Mr. WITHERS. Oh, I know you are.

Senator LAUTENBERG. I'm very interested in your views, and I would just move to Ms. Sohn for a minute. Should the FCC require that XM and Sirius return some part of the spectrum if they merge?

Ms. SOHN. We have said that they should definitely look at that. You know, it's possible that XM and Sirius might have an idea for that extra capacity that would serve the public interest, particularly local broadcasting. I mean, I guess I don't understand why it wouldn't be better for New Jersey to have the combined entity do local programming and broadcasters do local programming. I know you have that problem with WOR and New Jersey is often underserved. So, why not allow more local broadcasting. So it really would depend on the plans that XM and Sirius have for the extra capacity; however, I do think it's something the FCC should look at, whether they really need to have all 12 megahertz of spectrum.

Senator LAUTENBERG. Yes. That would certainly, I think, provide an outlet for competitive operation. And I think it's fair to say, Mr. Karmazin, that the most obvious conclusion that one draws is that it would be awful good for the companies, for the two organizations. The question is, is it as good for the consumer as it is for the companies. We'll be looking at that, Mr. Chairman. I ask for a period of time to try to make some decisions on our side as well as—

Mr. KARMAZIN. Did you want me to answer that question? I'm a resident of New Jersey.

Senator LAUTENBERG. I just changed my mind, Mr. Chairman.

Mr. KARMAZIN. And I know exactly what you're talking about, but let's just get real about this. So you get into your car in New Jersey and you have an AM/FM radio. And if in fact you chose to and you decided that you wanted to pay for radio in addition, that we have convinced you that the content we offer is worth paying more for than for something you get for free, then you'll have the satellite radio. And the merger makes it beneficial to the consumer.

I'm not talking about the benefit, you know, for anybody but the consumer in what my comments are because I believe lower prices and more choice for the consumer is a good thing. And we are not looking to replace local radio. Local radio is going to exist and local radio, by the way, is financially amazingly healthy, you know. I've been in it for a long time and made an awful lot of money in it. And if you question it, just take a look in the papers and see how much money Clear Channel is selling itself for. So there is no question that there is a very, very healthy terrestrial radio who, by the way, got HD radio for nothing. So the same people that control the AM/FM radio stations today are also being given free HD radio. So this is not a troubled industry, and we are not saying that Sirius is troubled, but we do believe that if you believe that choice for the consumer is a good thing, then this merger is a good thing.

Senator LAUTENBERG. If I may, Mr. Chairman for a second here, maybe a couple of seconds. I had in the car I own, a General Motors car, XM radio. Now along the way—and I pay for it—along the way suddenly a choice part of that was taken away. So effectively if I want to have the same kind of programming, my price has just gone up substantially. And I'm talking about MSNBC, that was shifted away from XM radio.

And so now I have to pay separately for what I used to pay only one time for.

Mr. KARMAZIN. Not exactly accurate, sir. MSNBC was taken off by a lack of popularity. You can't buy it. It doesn't cost you more, it just was replaced at a higher channel. It's not like they are selling it at a higher price; they just said we are constrained with a certain amount of bandwidth and we are going to put channels together that are going to be covering a broad spectrum, so they have Fox News, they have CNN News, they have public broadcasting.

Senator LAUTENBERG. What does Sirius have?

Mr. KARMAZIN. Sirius has Fox News, CNN News, NPR News, BBC News, we have ABC News, so we have an——

Senator LAUTENBERG. So MSNBC is no longer——

Mr. KARMAZIN. Correct. We do not choose to have MSNBC as one of the channels we offer.

Senator LAUTENBERG. We have to expand the spectrum.

Mr. KARMAZIN. I welcome that.

Senator LAUTENBERG. Thank you very much.

The CHAIRMAN. Senator Dorgan.

Senator DORGAN. Mr. Chairman, I have to leave. I'd be happy to defer to the gentlewoman from Minnesota if she wishes.

**STATEMENT OF HON. AMY KLOBUCHAR,  
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you, Mr. Chairman. I look at this deal as a consumer. Is it true that some of the customers will have to upgrade their equipment if these companies merge?

Mr. KARMAZIN. No.

Senator KLOBUCHAR. Is there any kind of a change to the equipment or anything that they have to buy?

Mr. KARMAZIN. No. Senator, if you subscribe to one or the other services today, that radio will not be obsolete. You will still be able to get everything that you're currently getting from that service today. And additionally, we are willing to add to that with the existing radio the ability to get some content from the other partner as well, but the receivers will not be made obsolete. As a matter of fact, if you went into a retailer today you will see both companies having a guarantee that we are offering the consumers that says that it's a guarantee that these radios will not be obsolete.

Senator KLOBUCHAR. To follow up on some of the questions that Senator Lautenberg was asking about the spectrum, and the amount of spectrum was given out with this idea that there would be competition. I just wonder, I know that Ms. Sohn answered the questions, but I wonder if others could answer that. He was going into the area of whether some of the spectrum should be returned when we don't have two companies competing. You want to start, Mr. Kimmelman?

Mr. KIMMELMAN. Yes, I'd love it. Retaining twice the spectrum initially allocated violates the FCC's own guidelines for how this spectrum was auctioned so it's in direct violation of the rules. I would hope you would be promoting competition as opposed to monopoly, but if you went down the path that there should only be one satellite radio provider for whatever reason, our financial analysts tell us they are going to consolidate content onto fewer channels. And we have already heard from Mr. Karmazin in previous hearings so they have got excess capacity.

The problem here is that you've got this interoperable equipment—the consumer has been held hostage here, Senator. We had a promise of interoperable equipment that wasn't fulfilled. Mr. Karmazin says they couldn't do it because, because they would lose customers. Well, if they worked together, or even if they had come to the Congress if they really felt they needed an antitrust exception to be able to come up with one standard for equipment and then competed on that, we wouldn't be in this situation.

But now we have two different pieces of equipment, which they say they will keep functioning, and they are going to hold us hostage for all the spectrum. So if you decide to go with the monopoly consider what Senator Stevens proposed with the DTV transition, which is make the first dollars from an auction of the reclaimed spectrum available to you to hold consumers harmless, and you probably would have money left over for the Treasury for other purposes. So if we went down that path, there is another model here that gets them the consolidation they want, and the synergies which will let them squeeze programmers, squeeze auto manufacturers.

I still don't clearly see any benefit to consumers, so you would need some sort of regulated price, but by requiring that some spectrum be returned you would be able to have spectrum available for other purposes.

Senator KLOBUCHAR. Others want to answer this about the spectrum?

Mr. BANK. Well, I think from a practical purpose what we would say as financial analysts is a stronger company would probably lead to greater technological innovation. And you know, ultimately I think while it's going to be up to the management of what they do with the spectrum there is very good likelihood that you'll see improved innovation and additional products that will program that spectrum. So you know, from a practical perspective if you took away some of the unused spectrum, I think the key driver in this industry is its entrenchment in the automotive industry and the original equipment manufacturers. It would be relatively difficult from a standing start for a new competitor in satellite radio to probably penetrate that entrenched competitive landscape right now. But the reality is you may be trading off technological innovation that could bring a lot of really interesting and important new products.

Senator KLOBUCHAR. Mr. Karmazin?

Mr. KARMAZIN. Let me give you the spectrum answer. Senator Lautenberg mentioned that he has a car that has an XM radio and if in fact we were to do anything with this spectrum, what we are now telling Senator Lautenberg is that he needs to buy a new radio because his receiver is only able to receive the XM satellite and the terrestrial repeater networks. So the idea of us not having the spectrum that we currently have would be a disservice to the consumers, because they would be the ones that would be disrupted because their existing receivers are only tied to be able to receive the existing system.

I think the whole question, Senator, about satellite radio right now, and we got our first subscriber in 2002 and we had 6 million subscribers at year end last year, and XM had a little over 7 million subscribers, that the idea of these words that Consumer Union is using, and especially the comments that the NAB is using about satellite radio being a monopoly and that, you know, somebody must have their satellite radio when there are terrestrial radio with local radio, with the stations able to put whatever content on it—and I'm sorry, but we compete with all of this radio.

There is HD radio. If you take your cell phone and you put your cell phone in a Bluetooth device in your car, you're able to get all kinds of content, sporting events, all kinds of news, all kinds of music coming through your radio speakers in your car. So the fact that 10 years ago, you know, when the FCC gave us our license, there was a policy statement. I don't think you want to use policy statements that were made 10 years ago insofar as dealing with the reality in the marketplace 10 years later, particularly since that marketplace is so robust. So there is plenty of audio entertainment content available to the consumers and I think the American consumer would be better off if they had a stronger competitor to terrestrial radio and satellite radio being combined.

Senator KLOBUCHAR. Mr. Withers?

Mr. WITHERS. My response to that is, it's an interesting observation that we have to make. If we are going to merge, we have to maintain both systems; otherwise, we have short sheeted the one that doesn't have it. But then also by the merged monopoly continuing to have the entire 25 megahertz, there will be no way and no time where another competitor could enter, enter the satellite race.

I did want to address the fact that we had a dangling gift a moment ago where we were given the free HD, when all we've done is, as they multiplexed their signals and satellite, the Commission originally thought each carrier would have about 50 channels, and the technological advances of multiplexing has allowed 133 in one case and 170 in another, and that's fine. But HD is done with our existing frequency, so we weren't given anything. We have had to spend money to provide another service for free to the American public and that's where that came about.

But I think if you're going to have, as Mr. Kimmelman said, if they go down the road that way, it doesn't make any sense to leave all the spectrum there with the merged monopoly.

Senator KLOBUCHAR. Thank you.

The CHAIRMAN. Thank you. Senator Dorgan.

Senator DORGAN. Mr. Chairman, thank you very much. Mr. Karmazin, first of all, thanks for visiting yesterday. You are a very accomplished chief executive officer and as I said, I'm a customer. I like satellite radio. But as I understand your message, what you are saying is both companies are in pretty good shape. You believe both companies are in a position to reach profitability and that is not what provokes a merger. You talk about merging for purposes of efficiency, and the efficiency therefore would result in savings which then would be good for the consumer.

I'm trying to understand that. I'll give you a chance to comment on it, if I can ask a couple of questions in the middle of all of that.

One, what kind of equity position does Clear Channel have in either of the satellite radio companies?

Mr. KARMAZIN. Clear Channel has no position in Sirius and you know, I don't know for sure, but let me tell you what I believe, is that when XM first started, Clear Channel was an early investor and they owned a certain percentage, I want to say about 10 percent of the company. They have subsequently monetized that investment and are no longer—they were a board member at some point. They are no longer a board member of XM nor do they have a financial interest in the company as a result of that monetization.

Senator DORGAN. That's fine. Mr. Karmazin, I called XM some while ago about a programming change because when I was out running I would listen to XM, and they changed programming. And I called them and asked them why they changed that particular kind of programming on those channels. They said it was because of Clear Channel and Clear Channel had a certain percentage stake in the company, had certain proprietary capabilities in various channels. I'm trying to understand that because that's also a part of this.

Mr. KARMAZIN. Senator, I think the answer to that question, because that wasn't financial investment, but Clear Channel has a certain number of channels remaining on XM service so that today

XM has some Clear Channel program stations. So therefore, a change that was made on a channel was the result of Clear Channel making a decision on one of their channels.

Senator DORGAN. It's interesting, though, that this discussion about what is the new competition, if one were to describe the new competition the way you described it, iPods and cell phones and the broadcasters, that the broadcasters are actually a part of XM, in this case one of the largest radio broadcasters is actually a part of XM. And second, if satellite radio and broadcast in general competes with iPod and cell phones, I suppose the logical extension of that is there needs to be no ownership limitations anywhere because everybody competes with everybody.

Let me ask about pricing, if I can put up this chart. Some have been very critical that there has been a substantial amount of money spent in the early days. I read that in the papers. I don't have the foggiest idea what you're paying anybody else. If we were to ask both XM and Sirius what you are paying for this programming, would we get answers to all of it?

Mr. KARMAZIN. I don't know whether or not we can answer all of it, whether we would give you everything that we have a right to talk about. So on anything we are not precluded by a contract, there is nothing that we would hide. In other words, I would be happy to tell you what we pay for Nascar because we announced it, so we announced that we pay \$20 million a year for the rights to have all of the Nascar races. That was public. The Oprah announcement was public. The Howard Stern announcement was public. I don't know whether or not Senator Bill Bradley, who gets a very small amount of money, would want us to be talking about how much money he is making. I'd have to leave that to whether he would want us to do that.

Senator DORGAN. Well let me send you a letter and you tell me what you can and what you can't answer. My understanding is most of it, you are not able to answer because of what you call confidentiality agreements.

Why did Sirius drop C-SPAN?

Mr. KARMAZIN. We like C-SPAN, we wanted to keep it. One of the things we have is some constraints on our content, so we are often rotating channels and making changes. C-SPAN was a very, very low utilized radio channel on our service and we felt that we would be able to serve our customers better by providing another service to C-SPAN. C-SPAN is available on XM. It's just not available on Sirius.

Senator DORGAN. Let me say, Mr. Withers, while I believe that this merger is not a good thing for the consumers, you're not exactly a perfect messenger here. As you know, you come to this table in most cases supporting substantial increased concentration, and my concern about the merger is the concentration in this case from two to one. But when I look at radio broadcasting and particularly radios, there has been a very substantial concentration there and I worry very much that the very argument that Mr. Karmazin makes here is an argument that will be made by you at the next hearing when you come to the table to say, you know, when you define this market and you talk, Senator Dorgan, about concentra-

tion, understand that Clear Channel and all these companies, they are competing with cell phones and iPods.

When I say you're not a perfect messenger, in North Dakota, you all know the story, but all six stations in Minot, North Dakota were purchased by Clear Channel, every station in the town of 50,000, 40,000 was purchased by Clear Channel. And at 2:30 in the morning they called the radio station, nobody answers the phone, you know, why would that be. And so I would just observe while we are on the same side on this issue, I don't view the broadcasters as perfect messengers to this subject.

And let me just ask Mr. Bank, and I'll be glad to have Mr. Withers comment in a moment.

Mr. WITHERS. I was going to make, if I might—

Senator DORGAN. Yes. Go ahead.

Mr. WITHERS. One that we are talking about radio companies, and when we have, XM and Sirius are national radio companies basically. But as far as us at the broadcasting industry and the National Association of Broadcasting asking for more concentration of control, if there has been proposals they have been *de minimis*. It's like we are limited, I understand they are limited to—I'm sure I've heard, so have you, that we want all ownership limits removed. I'm not a party to that but if you have, if you're allowed to own eight stations out of New York for example, the proposals I have heard kicked around, it might go to, 10 or 12 would be the proposals. But still, that's a long way from the 330 some odd.

And Clear Channel must have heard your message that you repeated because they have sold those stations; they are on the block and will be sold.

Senator DORGAN. On the block. That's more correct.

Mr. WITHERS. They are disassembling a lot. They have 440 stations up for sale right now.

Senator DORGAN. Well, we'll see. I hope we can have some hearings on the issue of localism one of these days as well, because that's another part of what broadcasting used to be and too often is not any longer.

Mr. WITHERS. We may welcome those. Thank you.

Senator DORGAN. Mr. Bank, you indicate, you talked about these synergies in support of, and I understand you come from New York and you're looking at the market side of this. Synergies, first, are straightforward simply eliminating redundant effort components. We had a hearing in this room not very long ago with a couple of airlines that wanted to merge, and they made exactly the same case. My guess is any two companies that would come to the table, or any company that comes to the table saying I'd like to merge with another company in their industry with any circumstance where there is some dominating position, I think they would be able to make the case that there are synergies and efficiencies. Would you agree that there is no unique case to be made here at all with respect to synergies or efficiencies, just as there are not with two airlines that want to merge and become one because they combine their reservation systems and so on, or is there some unique thing that I'm not aware of here?

Mr. BANK. Well, I think the unique issue is more on the content side where you, the second example of where the synergies can

come from. But the reality is yes, you know, network architecture and back office savings are probably relatively common to any two companies in the same industry where you can derive savings.

Senator DORGAN. And Mr. Kimmelman, finally, I suppose people perhaps say this of me but I probably should say it of you. We can probably guess your testimony before the hearing started. You generally are opposed to mergers and these sort of things. Tell me what's unique about your opposition to this, if there is anything that's unique.

Mr. KIMMELMAN. Senator Dorgan—

Senator DORGAN. I admire that position, I don't say that to denigrate it, but tell me what is unique about your opposition to this. Then I'll ask Mr. Karmazin to respond.

Mr. KIMMELMAN. It's when it gets to a point of concentration and reduced consumer choice, and here we are talking about not all consumers but the 14 million who have, and maybe the 20 million who want real mobile national audio programming. They would be severely harmed here. That's a significant segment of the consuming public. And going from two to one is one of the most extreme losses of competition that we could face. So, it opens, if you follow the logic of this type of merger, even if it's not the most important service in the world to consumers, it opens the floodgates to more broadcast mergers, more cable mergers, more newspaper-broadcast mergers just by following the exact same reasoning.

So as a matter of principle, as a matter of logic, using the same analysis we've used in all those other mergers, this one just doesn't pass muster.

Senator DORGAN. Mr. Chairman, let me ask Mr. Karmazin in fairness to respond to the issue of is there unique synergy and so on, and then if I could ask him again, could you give me the construct of how this merger putting two into one would benefit the consumer, because I think that's the case you've made.

Mr. KARMAZIN. Sure. I think we have not yet submitted our answer to the Department of Justice as to what the efficiencies of this merger will be, but we believe there are some compelling efficiencies that we will be able to make to the Department of Justice that would demonstrate that this merger has unique opportunities for efficiencies which would mean benefits to the consumer.

And I can tell you that with no details of the merger, you know Mr. Kimmelman was against the merger obviously because of the fact that we are in the media world, and there is no such thing as a good media merger. And we happen to think that this is one that is.

And in answering your last question, the benefit to the consumer is the fact that the consumer will have more choice if the merger is allowed to proceed than they will if the merger is not allowed to proceed. The consumer will get lower prices if the merger is allowed to proceed than they will get if the merger is not allowed, so lower prices and more choice are the benefits to the consumer.

The CHAIRMAN. Thank you. Senator Thune.

**STATEMENT OF HON. JOHN THUNE,  
U.S. SENATOR FROM SOUTH DAKOTA**

Senator THUNE. Thank you, Mr. Chairman. I want to thank you for holding this hearing today and thank our witnesses for taking the time to testify before the Committee, and for your input.

Satellite radio is a particularly important resource for those of us in rural states. There are too many places in my state of South Dakota where you can turn on the terrestrial AM/FM radio, hit the seek button, and just have the dial spin and spin and spin. So for traveling businessmen and women, farmers, and many other music or sports enthusiasts in South Dakota, satellite radio can be one of the few consistent means to get a wide variety of music and other radio programming. The definition of the market is obviously the key question in this debate. And it would be my hope that these hearings and deliberations at the FCC and Department of Justice will help us come to a clear understanding of how the market should be defined, and once that market is defined, I believe the invigorating fierce competition among market players is the best way to get consumers the best services at the best price.

Mr. Karmazin, can you promise customers of both XM and Sirius that they will not have to buy new equipment to receive the same coverage in the foreseeable future?

Mr. KARMAZIN. Yes, sir.

Senator THUNE. As I mentioned at the outset, satellite radio may have fewer terrestrial AM/FM rural competitors, there could be fewer alternatives for these listeners than for listeners in Chicago and LA. Does the competition in larger more populated areas between terrestrial and satellite make up for the lack of competition that exists in some rural areas?

Mr. KARMAZIN. Senator, we think this merger is particularly beneficial for people in rural areas because of the importance of satellite radio, and what we are committed to is to offer people lower prices and more choice. So we will obviously not be raising prices, and any price increases that you would be concerned about would be dealt with that we are a national service and not, we don't know where your radio is at any given moment in time. So you could be a New York subscriber but you could be somewhere in South Dakota, so yes, no new receivers and no higher prices.

As a matter of fact, we will have a lower price point than we have ever had before. We started our service in 2002 with a price of \$12.95, the exact same price that we have today, and as a result of the efficiencies that we would get from this merger, because we have said the benefit, we know there is a benefit to shareholders, but there has got to be a benefit to the consumers. So we are going to take some of the benefits that our shareholders get and put it back in the form of benefits to the consumer, and that will result in lower prices, so we will have a package that will be available of service below the current \$12.95, so it will be cheaper, not necessarily more expensive.

Senator THUNE. Thank you. I appreciate the answer. Mr. Withers, if you believe that local terrestrial radio stations are not competing against satellite radio, then why are many local radio stations and the NAB coming out so strongly against the merger?

Mr. WITHERS. We don't compete against them on the national level because we can't. They are a national radio company. Both of them are. But they compete against us every day, and that's why. Because if we have a market like your markets in South Dakota where there are not that many—in fact, I have a truck in Colorado that at night I can't pick up anything up there at the ranch except satellite. So I hate to tell this to Mr. Karmazin, but I happen to be an XM subscriber there and it works because I can listen to ball games, et cetera, but they compete against us every day by the plethora of channels that they have. And when you're a national radio company, you program nationally. We can only program locally, so we are competing against that, that morass of signals that we have, we can't have any more than what we have, and that's where we are.

Senator THUNE. Who would you define as competitors to local AM/FM radio?

Mr. WITHERS. Who would I?

Senator THUNE. Yes. I mean, what's your competitive environment?

Mr. WITHERS. The competitive environment is the satellite companies obviously and anybody that takes attention away, iPods, we have talked about cell phones. iPods are individually programmed stations and basically it's what you have a personal preference for and what you want to hear and when you want to hear it, and we have no quarrel with that. Because we have found that when it's information they need, and other entertainment with the news, they will revert back to the local over-the-air stations, the terrestrial stations.

I think some of the things that have been bandied around today about competition, and broadcast over cell phones and over this and over that, and the Bluetooth and the Red Dragons, all the things that we do in cars, out of cars, that would be fine 15 to 20 years from now. But when this merger was proposed and filed back in March, we looked at the existence in the marketplace as of the date that it was filed. And then they are not the competitors that they will be 15 or 20 years from now. In 20 years we can look at it again and see where we are. The direct answer to your question, which I'm sure you'll be pleased to hear, is anything that diverts the attention away from listening to AM and FM radio.

Senator THUNE. Ms. Sohn, in your testimony you describe XM and Sirius as basically weak in their current state, and if the merger passes antitrust scrutiny, then you would support the merger with a few conditions. Why do you believe that conditions are needed for the merger, and won't the competitive marketplace not provide enough checks and balances on the new combined satellite radio providers?

Ms. SOHN. Well, I guess I'm not sure. And you know, even if the authorities pass muster on this, I still think it would be better for the consumer to have some protections. So I mean, I tend to think that the market is a little bit broader. I think some of the opponents of the merger are sort of prejudging what the antitrust authorities would say. I think that the antitrust authorities have to look at consumer data and decide, you know, do iPods—there are tons, tens of thousands, hundreds of thousands of podcasts out

there. It's not just that you go to iTunes and put songs on your iPod. In fact, there was a recent study that showed that for every iPod there is an average of 22 purchased songs. So most people either use the songs that they already have on their CDs or they go to the tens of thousands, hundreds of thousands of iPods out there, OK?

So I think that, that kind of data needs to be out there, the antitrust authorities have to look at it and say OK, is this something that will keep satellite radio prices low? I mean, we could differentiate every single, you know, the iPod or Internet radio, we could spend all day saying it's not exactly like satellite radio. We know this but that's not the relevant question. The relevant question is, is it substitutable in a way that would keep satellite radio prices low.

But let me get back to your main question. The main question was why the conditions. Again, I still think even if the antitrust authorities pass on this and say it's OK, I still think there needs to be some temporary conditions to ensure that prices don't get up, that there is still diversity of programming, and that consumers have programming choices, which it sounds like some of these things the combined entities are willing to promise. They don't seem to be particularly burdened by it.

Mr. KIMMELMAN. Senator Thune, I'd just like to say that maybe some things aren't known, but their 10(k)'s indicate quite clearly that their revenue is up 50 percent, subscribership is up 50 percent just last year, the year before. These are not failing companies. These are not companies that can't compete against each other. They are companies that are holding consumers hostage by signing exclusive deals so that you can only get the NFL on one and NBA on one, usually baseball on the other. Holding consumers hostage by not working together by having interoperable equipment so you can have the same equipment and pick whichever you want. And now coming in and saying the only solution is to allow them to merge and dominate this market, where in many parts of the country there is no local broadcast radio to listen to. So I think there are a lot of facts known here that should lead us to believe, as Senator Inouye said at the beginning, there's great skepticism about allowing them to merger two to one. More facts would be wonderful, but a lot are already known.

Senator THUNE. I appreciate that. Mr. Chairman, I thank you for holding this hearing and all of you for your testimony. I think any time you start talking about going from two to one, that's pretty unusual in a competitive market environment, and so I think you can understand why there is going to be a good deal of scrutiny and analysis given to this proposal. But I appreciate your answers to the questions. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Senator McCaskill.

**STATEMENT OF HON. CLAIRE McCASKILL,  
U.S. SENATOR FROM MISSOURI**

Senator McCASKILL. Thank you, Mr. Chairman. It's been a long time since I've sat in a college economics class but I have to confess to you, Mr. Karmazin, that as I sit here, I don't ever recall the lecture where less competition delivers more choice and lower prices.

On its face less competition does not mean more choice and lower prices. And if, if we are to assume that you are testifying in good faith that your company is going to sacrifice stockholder profits indefinitely in the future to keep prices low, then I think we need to look back at commitments that have been made previously that have not been kept. And I want to specifically ask you about the repeaters.

In St. Louis, nine of the 11 repeaters exhibit some kind of variance with FCC rules. You have clearly ignored FCC requirements on repeaters in the way that you have rolled them out across the Nation. With that and the promises that were made about interoperability in terms of receiver boxes, which I know has been covered prior to my arriving at the hearing, I apologize, I was at Armed Services, it's been 10 years since promises were made about interoperability, and as one of your subscribers I've never heard about such a thing.

I'm a consumer. I've never heard about interoperable receivers. I have never heard about where I could buy one. I have never heard about how much it would cost. And that makes me more than cynical and suspicious about the testimony you give about more choices and lower prices by eliminating competition. Could you speak to your failure with respect to FCC compliance as it relates to the repeaters?

Mr. KARMAZIN. If you don't mind, I'd like to respond to all three of the points that you raise. So first of all, on the economics class, we compete with free radio. And the reason that, if you were to take a look at our SEC filings going back 10 years, what we have said is that we compete with AM/FM radio. You have to acknowledge that if you are in a car, Senator that you have in that car an AM radio and an FM radio, and let's assume that you are a subscriber, you also have a satellite radio. And to say that those things are not competing with each other is just not fair. So the fact is that what keeps the prices low and why we are willing to deal with it is because of the fact and the reason that the NAB is here today, is that they don't want us to lower our price because if in fact we lower our price we will get more subscribers, because it is easier to compete with free to charge a lower price than to charge a higher price. So what is the reason for it and why are we willing to do it? The reason we are willing to do it is that these efficiencies can only come about by the two companies combining, and that we are prepared because there are so many synergies, to give to the consumer some of this choice.

Regarding the terrestrial repeater network, I'm not familiar specifically with St. Louis but I can tell you the fact that we found out that we had 11 in total terrestrial repeaters at Sirius that were operating not consistent with the FCC rules, and the day, the day I found out about it, I turned them off, because we believe in following the rules.

If you wanted to look at the rulings, Senator and look at broadcasters who we compete with, there hasn't been almost a single broadcaster that has not either been found violating some FCC rule, whether it was children's programming in the case of a \$24 million fine, whether it be in the form of payola from a bunch of radio stations, whether it be AM on later hours. So I don't condone

violating the rules. I don't believe in violation of the rules. I've been a licensee for too long to do that. That, we'll deal with the consequences, whatever those consequences are of the FCC, and if in fact the FCC fines us or does something, we would prepare to deal with violating rules.

As it applies to the interoperable radio, if you take a look at what we were asked to do, what we were asked to do was to develop an interoperable radio, and we spent millions of dollars, XM and Sirius, on developing the interoperable radio. It's not a loophole. It's not a hedge. There was no obligation on our part to commercially market an interoperable radio. That's for receiver manufacturers to do. We certainly have made our IP available to any receiver manufacturer that would like to develop an interoperable radio.

So we have in fact lived up to everything that we have committed to the FCC as it applies to that.

Senator MCCASKILL. Well, I understand that you know that you compete against free radio but you also compete against the other satellite company, and it is apples to apples here. It is a different type of listening experience. If I'm listening to music, I know that if I listen on my satellite I'm not going to listen to commercials except frankly, I will tell you just as a consumer, the irritating promos for other XM stations. It's much different listening to music, listening to classical music on a satellite station versus listening to classical on a commercial station.

I think you compete only in the significance of local programming, which I think is an issue for Mr. Withers and his colleagues, because if broadcasters don't maintain local programming, you're going to lose a competitive niche that you have against satellite. But you as a company subject to satellite to satellite competition, when it was time for me to decide, I had two competing companies that knew that they had to compete with one another to give the best and to be service oriented and to, in fact, compete on price. Now if there is only one satellite option, I think it is really unfair to try to claim that that is not eliminating competition. Clearly it is eliminating competition within an apples to apples comparison. I know that people violate the rules, but what you're asking us today to say is we are going to live up to what we are telling you today in this hearing. And the bottom line is, there were representations made that interoperability would be commonplace and it's not. You have subsidized receivers for years, but the two of you have not made any effort, which I understand as a business model, but I'm just talking about overall from the consumer's perspective, I'm not here to protect your shareholders, I'm only here to protect the consumers, I also want to ask with respect as to the repeaters that are in St. Louis, will they be brought into compliance if this merger occurs?

Mr. KARMAZIN. Senator, there was not anything that said that interoperable radios would be commonplace. If you'd like, if you want to send me what you've read that says that, we have said that it would be commonplace, I'd be very happy to admit that I'm wrong. But I believe you're wrong, Senator, that there is nothing that said that, and that we did live up to—

Senator McCASKILL. I guess the FCC rule gave that impression. I mean, if you read the actual language of the FCC rule, it's very clear that one would get the impression in plain language it's going to be required.

Mr. KARMAZIN. I've read the rule and I don't believe that's accurate. And in answer to your question on the repeaters, that yes, that we do not believe on operating anything that's not consistent with the FCC rules, and that's true in the case of Sirius, all of the noncompliant repeaters are off. They are not on, in answer to your question.

In the case of XM, there are discussions underway in demonstrating to the benefit of the consumer, to your constituency who feel that there is no interference in those repeaters and that the service is better, and there is discussion as to whether it's in the public interest to keep those repeaters on or to shut them off, and whatever the FCC does, XM will conform to.

Senator McCASKILL. Just for the record, let me quote from the rule, "a receiver that will permit end users to access all licensed satellites' DAR systems that are operational or under construction."

Mr. KARMAZIN. Doesn't it say will develop? That's what we did.

Senator McCASKILL. Their systems must include a receiver that will permit.

Mr. KARMAZIN. That's what I said. Senator we have developed it. It doesn't say it will be commonplace. It doesn't mean that we will advertise to you. It says that we will develop it, and we have, Senator.

Senator McCASKILL. Well, I appreciate your testimony. And just so that I'm an equal opportunity questioner this morning, just briefly let me say to Mr. Withers, first, let me acknowledge that I recognize that you have a number of stations in my state. Let me also say that in the boot heel, between you and Gary Rust, it's hard to get any light. You dominate that area of the state and Gary Rust dominates the papers in that area of the state, so we have two large media conglomerates that for someone who has tried to navigate news and so forth in that area, sometimes it's a little difficult. So I encourage you to keep in mind that competition is very important regardless of whether or not we are talking about the free broadcast radio airwaves or whether we are talking about satellite.

Mr. WITHERS. Thank you for acknowledging the fact that we do have stations in your state, yes. But I don't dominate the ownership of the stations in the boot heel. For example, in Cape Gerardo, there are 13 stations and I, my daughter and I have six combined, and there is one newspaper, so that's different.

Senator McCASKILL. You're right. Mr. Rust has a leg up on you, there is no question about it.

Mr. WITHERS. He has stations in Bluff and Sikeston and—

Senator McCASKILL. He has them all.

Mr. WITHERS. I introduced Gary and his wife 30-some years ago, so obviously he is a great salesman, or she is. And I agree with your comments about localism, that's very important, and the stations that don't do local broadcasting don't deserve to be successful, and I feel very strongly about that and I also concur with your idea on ownership. We have to earn our listeners. They don't come to us.

Senator McCASKILL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Most of the questions I have have been asked, but Mr. Karmazin, you indicated that a consumer or subscriber may opt out from paying, and you'll get credit if you cancel certain adult channels.

Mr. KARMAZIN. Yes, Senator.

The CHAIRMAN. Let's say that I wanted to cut out Howard Stern. What sort of credit would I receive?

Mr. KARMAZIN. We have not made an announcement of what the exact amount would be but if you choose not to listen to Howard Stern, the way it works today is we'll block it or you can block it on your own receiver. After the merger is approved, and one of the issues in listening to people talking about their concern is that we heard them say that it's not just about not wanting to listen. We don't want our money subsidizing that content that's on the air. And what we have said is that we will have a credit, and at the appropriate time announce exactly what that is, what the credit would be for you not to listen, something I understand that hasn't been done in other forms of entertainment to date.

The CHAIRMAN. Will it be more than 50 cents or a dollar?

Mr. KARMAZIN. You know, Senator, we have not discussed exactly how it will work, you know. We have gotten some people who are talking to us about a package of those adult entertainment content, you know, and whether or not it would be on an individual station basis or on a group basis. And once we have announced what this would be, we would absolutely make you aware of that.

The CHAIRMAN. Well, so we have no idea what the benefit will be?

Mr. KARMAZIN. Well, no. We know that there is a benefit, sir. Right now what we are saying to you, what we don't know is how good a benefit it's going to be, but we know that there is a benefit because you will not have to pay for it, and you know we recognize that, and we understand that it should be an important credit.

The CHAIRMAN. I've been told that if you do have the merger, you will be eliminating about 90 channels because they are substantially similar or duplicative. What do you mean by that?

Mr. KARMAZIN. I think what some have speculated, because we have not been able to spend the time in discussing what will happen after the merger, we have been working through the regulatory process, and what we have said is that we are going to continue to provide a service that is essentially similar to the exact service we have. So if you subscribe to Sirius right now you will get essentially the same 130 channels that you're getting right now, and the same thing is true about the XM. There may be some efficiencies. So as an example, if we have a 1960s music channel and XM has a 1960s music channel, maybe we will have one 1960s music channel that would be available on both services. But you as a subscriber to the existing service will not be losing any channels.

The CHAIRMAN. Where does that enforce the model about 90 channels being eliminated?

Mr. KARMAZIN. Senator, I have not seen it. I have not seen that specific report, so I don't know where it came out of.

The CHAIRMAN. I've been told that it's in your filing for the public interest.

Mr. KARMAZIN. In our filing? Senator, if it's in one of our filings then I will look at it again, but I don't recall that specific language in any of our filings.

The CHAIRMAN. Right now you have—

Mr. KARMAZIN. Senator, I have a whole bunch of lawyers sitting behind me and all of them are shaking their head no, that they don't remember seeing it in any of our filings.

The CHAIRMAN. But you do plan, if you've got a 1960s music channel and XM has the same thing, you will cancel out one of them.

Mr. KARMAZIN. That is a definite possibility, but we have made no final determination on what the specific program lineups will be going forward.

The CHAIRMAN. You won't be able to tell us what the benefit of opting out would be?

Mr. KARMAZIN. Well, no. I've said that there will be a financial benefit of opting out, much in the same way, Senator, that we have not yet discussed what the lower price point was going to be insofar as the \$12.95. What we said is that it would be lower, so therefore, that's a benefit to the consumer because anything lower is better than the consumer has now. What we have also said is that if somebody wanted both services, they would currently pay \$25.90, and we said it would be a significant reduction to the \$25.90 that it costs today. The specifics were at the early stages, Senator, of going through what we believe is going to be a long process and that we have not focused and we have not provided the specific information, but along the way we will, sir.

The CHAIRMAN. Well, this application here speaks of 75 channels overlapped by generally providing substantially similar programming.

Mr. KARMAZIN. Now I know what you—that's helpful. So I believe in what we have said, we have described our service and we described that our service has content that is unique to Sirius and unique to XM, and then it has other channels that are substantially similar. So as an example, today we have the NFL and XM has Major League Baseball. That's different. Both of us have CNN News and Fox News. That's included in those 75 channels. What we have said, and I think what your aide did not give you, was we said eventually longer term what we might have is when there is a radio that would enable the service to be able to pick up both so that you don't need to have Fox News on both services, that we would have the ability to replace that duplicative programming with additional niche new programming, and that's the context that that was discussed.

The CHAIRMAN. At the present time, your coverage is on 48 states but not Alaska and Hawaii. When you do merge, will the coverage be by terrestrial means or by satellite?

Mr. KARMAZIN. Senator, currently our configuration of XM and Sirius satellite provides for coverage of the 48 states and not full coverage of Hawaii and Alaska. Part of our service, so if we looked at our license, our service provides that as a national service that we also have terrestrial repeater networks, and that we are prepared to commit to adding more coverage into Alaska and Hawaii

through our repeater networks, because the configuration of our existing satellite is doing whatever it can do.

The CHAIRMAN. I was told that when you got your license that the exemption was on the first generation system but now we have new systems. Can't you do it right now without the merger?

Mr. KARMAZIN. Senator, we have a satellite that we are going to launch in 2 years that is going into the same kind of orbit that our current one does, and I am not aware of any exemption that was done—I believe that we are fully operating in accordance with our license as it applies to how our satellites are flying.

The CHAIRMAN. Well, I know that it's not travel—may we submit questions to all of you? And we'd appreciate if we can get your responses.

Senator STEVENS. I have one question. Pardon me, Mr. Inouye. I've got to confess, I'm at a loss in terms of this technology. I was under the impression, and I think the Chairman is too, that we are going toward a development of a technology, that all satellite radio will be using that technology and there will not be the difference that would require a merger, you would have available that technology to anyone that wants to come in and compete in the future. Am I correct? Are we correct?

Mr. KARMAZIN. No. I think what we are saying is the same thing. I don't think we are in disagreement. We are saying that individually both companies are flying satellites and putting in terrestrial repeater networks. Putting in terrestrial repeater networks into low density population markets is a very very costly thing for a company to do. What we have said is that again, part of the synergy that we would get as a result of this merger is that we are prepared to take the cost and spend the money to put these terrestrial repeaters in so that people in more rural and less urban areas will be able to pick up the service. And by the way, it should be indifferent as to whether or not the consumer is getting it from the satellite or from the terrestrial repeater networks. They are all part of our national service and license. And I can also assure you that any additional satellite, any additional receivers and terrestrial repeaters that are put into your respective states would obviously be fully licensed in accordance with any local laws as well as the FCC rules.

Senator STEVENS. I wasn't clear then in my question. My question is, you currently have one technology base for one satellite provider and another for the other. You have to have separate sets to get them now. I'm led to believe that those are going to merge and that future satellite radio providers will have the identical technology. You're going to bring that about by reforming what you have now. Am I correct that if you merge, a future competitor would be able to utilize this same technology?

Mr. KARMAZIN. I don't know who that future competitor is.

Senator STEVENS. I don't either. But I want to know, is the technology available to the public once you merge?

Mr. KARMAZIN. Senator, I apologize, but I'm not quite clear I understand what your point is or what your question is. Is it that if our two companies merge, if our companies are the way they are today and after our companies merge we are going to operate the same kind of satellite and terrestrial repeater network as we did

before the merger. Nothing is changing, and we talked about that, and the reason is that we don't want to make these receivers not able to pick it up. What we have committed to is that and the reason that we have not expanded our coverage, you know—I mean, am I not making it clear?

Senator STEVENS. I'm not making it clear, I guess. When we developed radio, we developed a basic concept and all radios use that same technology. Now with satellites we have one set of receivers per provider, and another station has another. Which means that if you put them into an automobile, you're going to take one or the other, right? After you merge, you'll have one. You'll be using one system once you merge, is what I understand. Is that system going to be patented so that it would not be available to another competitor or is it going to be in the public domain, as the radio technology was once it was developed?

Mr. KARMAZIN. The systems that satellite radio has, because it's a subscription service, are proprietary. So it's not like somebody else can just put in a radio without paying us the \$12.95 to be able to pay for the subscription service. So you're dealing with a proprietary network that exists in the case in each of the satellite radio companies, and that's not something that some manufacturer can say, OK, I know what I'm going to do, I'm going to just put in a radio that's going to be able to get satellite radio and bypass our subscription service.

Senator STEVENS. My friend sitting next to you 30 years ago dealt me a straight royal flush in a five card stud game. Let me ask him, do you understand what I'm trying to say, Russ?

Mr. WITHERS. Yes, I do, Mr. Vice Chairman That hand was meant for me and you just happened to be sitting in my old seat at that time. That's what happened.

As I understand the question, you're asking after the merger, will the two noncompatible, like VHS and Beta, be thrown to one. And the answer is, and if you had heard the analyst talk about it earlier, at a later date that is their ultimate goal. But right now, and I don't know how far their ultimate goal is, but I would say 10, 15 years, you will have the two existing systems. And I hate to be speaking for Karmazin and Parsons, but I'll do it. The two existing systems that are there will have to be maintained; otherwise, it will not have the subscriber bases because all the sets out there are compatible each only to its own self.

The fallacy, or the part that I don't think that you have understood completely yet, and that's not a put-down, I just understood it today for the first time, is that 25 megahertz of spectrum is all that's available for the national satellite radio service. They do not intend to give back half of that when they merge. The monopoly national radio company will use all 25 megahertz, not half, and therefore there can be no room for another competitor. So it doesn't make any difference about the interoperability of a radio or the fact that they are going to pay them a fee to use their radio. There will be no space for a competitor.

Senator STEVENS. That I didn't understand. Thank you. Thank you, Mr. Chairman.

The CHAIRMAN. Well, with that, we'll be submitting questions and I hope we can get responses. I'd like to thank the panel. It was

a very interesting morning. I hope we can make some decision, but thank you very much. And with that, the hearing is adjourned.  
[Whereupon, at 12:01 p.m., the hearing was adjourned.]

