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Beyond the Fairness Doctrine: Radio's Fight over the XM–Sirius Merger

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There's a radio war going on in Washington, and this one has nothing to do with the Fairness Doctrine. Talk of re-imposing the requirement by the Federal Communications Commission (FCC) that broadcasters air opposing views on controversial topics sparked an intense and highly publicized debate this summer. Almost lost in the "fairness" furor, however, has been a second, but no less intense, radio industry battle over the merger of satellite radio providers XM and Sirius. After months of review, a ruling from the Justice Department is expected within weeks, to be followed by a decision by the FCC, which also must approve the transaction. The merger debate is different from the "fairness" debate in that it involves the structure, rather than content, of the radio industry. Like the "fairness" debate, however, the outcome could determine how Americans will listen to the radio for years to come.

Background. Satellite radio—the transmission of radio programming directly via satellite rather than via broadcasts from land-based towers—is a relatively new service. The FCC, overcoming the opposition of radio broadcasters, auctioned frequencies for two satellite radio providers in 1997, which were won by XM and Sirius for a combined $173 million.[1] The two firms began offering service until 2001 and 2002, respectively.

Growth for the new services has been rapid, with combined subscribership nearing 14 million last year. But despite this expansion, the firms have struggled financially. The cost of launching and maintaining satellites and other infrastructure is high, as is the cost of programming. (Howard Stern alone costs Sirius some $100 million per year.[2]) Neither XM nor Sirius has ever made a profit. In 2006 alone, Sirius lost $1.1 billion, and XM lost $719 million.[3]

Hoping to turn this dismal financial performance around, XM and Sirius announced plans to merge in February of this year. Among the benefits they foresee: accelerated development of new technologies as research budgets are combined; increased variety of programming due to increased channel capacity; and perhaps $3 billion to $7 billion in net present value cost savings.[4]

Of course, none of these benefits are guaranteed.[5] In dynamic markets, no particular outcome is ever certain; the specific results can only be determined in the marketplace. Nevertheless, the potential for real consumer gains from this transaction is real and substantial.

Merger Would Preserve, Strengthen Competition. Traditional AM and FM broadcasters, among others, are fighting the deal, arguing that since Sirius and XM are the only two firms offering satellite radio, the merger would create a monopoly. The two sides have spent hundreds of thousands of dollars

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on their campaigns, along with allies ranging from former Attorney General John Ashcroft (against the merger) to Frank Sinatra Enterprises (supporting the merger). Highlighting the intensity of the battle, the National Association of Broadcasters (NAB), the trade association for traditional radio, even hung on its D.C. headquarters building an outsized banner, proclaiming: "XM + Sirius = monopoly."[6]

This argument, however, doesn't square with the facts. Sirius and XM have plenty of competitors, starting with the broadcasters themselves. In fact, counting both broadcast and satellite services, Sirius and XM have only 3.4 percent of the total radio listenership.[7]

But that is only the beginning. Internet-based service is increasingly becoming a player in radio. Moreover, other forms of audio entertainment compete for American ears. In fact, i-Pods and other MP3 devices, which have grown phenomenally in recent years, may be the biggest challenge to radio of any kind.[8]

Even the National Association of Broadcasters has noted the broad nature of competition in audio entertainment, stating to the FCC this January "…there can be no reasonable doubt that the current media marketplace is robustly competitive, and indeed exploding at the seams with consumer choices for both delivery mechanisms and content."[9]

More directly, NAB president David Rehr remarked on the tough competitive landscape: "Who are our newer competitors? On the radio side, we have satellite radio, Internet radio, iPods, other MP3 players, cell phones, and others."[10] Far from monopolizing anything, satellite radio is still an upstart challenger in the audio entertainment marketplace.

Yet, opponents maintain that Sirius and XM have no competition. Economist Gregory Sidak of Criterion Economics has argued that competition in one aspect of the market doesn't necessarily mean there is competition in others. Specifically, he maintains that radio is a "two-sided" market, in which terrestrial and satellite radio compete for *advertisers,* but not for *listeners*. For listeners, Sidak argues, the two types of radio are complements, not substitutes, for each other.[11]

1. Federal Communications Commission, "Auction 15: Digital Audio Radio Service (DARS) *wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=15*.
2. Sirius Satellite Radio, "Howard Stern and Sirius Announce the Most Important Deal in Radio History," press release, Oct. 6, 2004, at *www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=PresReleAsset&cid=1097008921509*.
3. XM Satellite Radio Holdings Inc., and Sirius Satellite Radio Inc., "Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc."(MB Docket No. 07-57), filed with the Federal Communications Commission, March 20, 2007, at *svartifoss2.fcc.gov/servlet/ib.page.FetchAttachment?attachment_key=-126018*.
4. See Thomas W. Hazlett, "The Economics of the Satellite Radio Merger," June 14, 2007, at *fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519527923*.
5. Sirius and XM have made a variety of commitments regarding their post-merger practices, ranging from a price freeze to allowing customers to choose channels on an "a la carte" basis. While these commitments are apparently based on the firms' expectation of benefits from the merger, no service guarantees should or need be mandated by regulators as a condition of the merger.
6. "NAB Pulls out the Big Guns: Hangs Banner out the Window," *Orbitcast*, June 13, 2007, at *www.orbitcast.com/archives/nab-pulls-out-the-big-guns-hangs-banner-out-the-window.html*.
7. "Arbitron: Satellite Radio Accounts for 3.4% of All Radio Listening," RadioInk.com, at *www.radioink.com/HeadlineEntry.asp?hid=137022&pt=archive*.
8. See remarks of David Rehr, National Association of Broadcasters, National Press Club, October 4, 2006, p. 5.
9. Reply comments of the National Association of Broadcasters, "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, at 34 (filed Jan. 16, 2007).
10. See remarks of David Rehr, National Association of Broadcasters, National Press Club, October 4, 2006.
11. Sidak, J. Gregory, "Supplemental Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc," July 9, 2007.

That claim doesn't hold water. While many consumers do enjoy both types of radio, the relative merits of AM and FM radio certainly impact a consumer's decision as to whether to subscribe to satellite service. Conversely, the merits of satellite service certainly affect how much its subscribers will listen to terrestrial programming. This view was expressed by the National Association of Broadcasters itself, which in a 1995 filing to the FCC wrote that satellite radio "fundamentally will compete with terrestrial broadcasters for listeners."[12]

NAB's Rehr used a slightly different argument in a recent letter to Congress on the competition issue.[13] He argued that while AM and FM broadcasters do provide competition to satellite radio in individual local markets, they can't compete in the market for *national* programming, since they don't have nationwide signals. This argument also is flawed. While broadcasters transmit signals locally, national programming—via networks and syndication—is commonplace.

Conclusion. The merger of XM and Sirius would not create a monopoly. Satellite radio is just one choice in an increasing array of audio entertainment options available to consumers. Rather than destroy competition, the proposed merger would *increase* it by allowing satellite radio to offer improved services to consumers. Regulators should reject the false arguments of satellite radio's earthbound rivals and allow the merger to go forward.

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12. Federal Communications Commission, *In the Matter of Establishment of the Rules and Policies for the Digital Audio Radio Satellite Service in the 2310 to 2360 MHz Frequency Band: Reply Comments of the National Association of Broadcasters,* IB Docket No. 95-91 (October 13, 1995), p. 34 (cited in Hazlett, "Economics of the Radio Satellite Merger.") Some also argue that competition is uneven because satellite radio is subscription-based and—unlike broadcasters, whose ad revenue depends upon ratings—doesn't lose money unless a customer drops his subscription. But subscription or not, satellite radio companies have no permanent lock on customers. A radio subscription isn't like an electric bill; few consumers see it as a must-have. If radio broadcasters provide enough of what they want, subscribers will drop satellite in a second.
13. David K. Rehr to the Hon. John Conyers, March 12, 2007.