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October 5, 2007

VIA EMAIL AND ECFS

The Honorable Kevin J. Martin, Chairman
The Honorable Michael J. Copps, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
The Honorable Deborah Taylor Tate, Commissioner
The Honorable Robert M. McDowell, Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Written Ex Parte Presentation in Connection with the Consolidated
Application for Authority to Transfer Control in Connection with the
Sirius/XM Merger, as amended
(MB Docket No. 07-57)

Dear Mr. Chairman and Commissioners:

The Consumer Coalition for Competition in Satellite Radio (“C3SR”), through its counsel, hereby submits for your consideration in the above-referenced docket the attached article authored by Professor J. Gregory Sidak entitled “Trusting the Antitrust Laws.”¹ The article primarily responds to the many attempts by Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Inc. (“XM”) to side-step the widely accepted principles of antitrust law – particularly the U.S. Department of Justice (“DOJ”) and Federal Trade Commission (“FTC”) *Horizontal Merger Guidelines* – to gain approval of their proposed merger. Such widespread and radical deviations from the *Horizontal Merger Guidelines* were recently rejected by the DOJ, FTC and the Antitrust Modernization Commission (comprised of economics experts charged by Congress to study any needed changes to antitrust law), and should be rejected by the FCC. Simply put, there is no merger-related public interest justification for turning a blind-eye toward the *Horizontal Merger Guidelines* in this case.

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A copy of this letter and the attached article will be submitted via ECFS for inclusion in the above-referenced docket pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, and Public Notice DA 07-1435 (released March 29, 2007).

Respectfully submitted,

Julian L. Shepard
Counsel for C3SR

Attachment

Trusting the Antitrust Laws

Sirius and XM are no different.

By J. Gregory Sidak

Antitrust law is under attack. Conservative columnists from the *Wall Street Journal* to the *New York Sun* increasingly denounce the utility of the antitrust laws in the high-tech era. According to this doctrine, the real purpose of the antitrust laws today is to allow competitors to prevent a rival from making strategic acquisitions or from developing innovative technologies. Because antitrust provides no benefits to consumers, the theory goes, it should be scrapped. Such has been the storyline in discussions of the current efforts for XM and Sirius satellite radio to merge into one company.

Since the day the merger was announced, XM and Sirius have engaged in a sophisticated campaign to undermine the integrity of antitrust law. XM and Sirius argue that the sheer dynamism of the satellite radio industry defies traditional market definition analysis. In other words, the government should scrap the existing merger guidelines, or at least give XM and Sirius a special dispensation because (in contrast to every other industry) satellite radio is *uniquely dynamic!*

A careful review of XM's and Sirius's filings at the FCC, which is provided in my recent [expert economic report](#), shows that the federal merger guidelines are being subverted in several ways:

- According to the merger guidelines, product market definition turns on how buyers — in this case, satellite radio subscribers — would react to an increase in the price of satellite radio services. In contrast, the vast majority of the evidence put forward by XM and Sirius consists of reactions by terrestrial radio providers or device makers — the type of “supply-side” information that is expressly excluded by the merger guidelines from the initial task of defining the relevant product market.
- According to the merger guidelines, two years is the appropriate time horizon over which to evaluate possible anticompetitive effects. In contrast, XM and Sirius argue that they are entitled to a longer window for analyzing whether their proposed merger may substantially lessen competition.
- According to the merger guidelines, the definition of the relevant product market turns on whether a hypothetical monopoly provider of the service (in this case, satellite radio) could profitably raise price above the competitive level for an extended period of time. In contrast, XM and Sirius argue they are entitled to have the FCC and the DOJ deviate from the “small-but-significant-and-nontransitory increase in price” test (known in antitrust jargon as the “SSNIP test”) so as to accommodate the supposedly unique circumstances of the satellite radio industry.
- According to the merger guidelines, the decisions of antitrust agencies should be based on

trying to maximize consumer welfare. In contrast, XM and Sirius argue that they are entitled to have those agencies base their antitrust analysis on total welfare, equal to the sum of consumer welfare and producer welfare. In other words, XM and Sirius in essence take the position that their proposed merger should be approved if the private benefit to XM and Sirius shareholders exceeds the harm to XM and Sirius customers.

Judging by the political winds, it appears that XM's and Sirius's campaign to subvert the merger guidelines has gained some conservative advocates.

As someone who came to Washington 20 years ago to serve in the Reagan administration (and now just so happens to teach antitrust at a law school), I regard the acceptance of this view among conservatives as overly simplistic. It is one thing to argue that the strand of antitrust law that prevents *a single firm* from abusing its monopoly power has the potential, if enforced carelessly, to impose large costs on society. It is something entirely different to say that the strand of antitrust law that prevents *two or more firms* from coordinating their pricing and quality decisions — either explicitly through a merger to monopoly or through secret communication — serves no pro-competitive purpose.

Indeed, the view that this second strand of antitrust law is still relevant today has been endorsed by the federal courts, the Department of Justice (DOJ), and the Federal Trade Commission (FTC). This view was also reaffirmed recently by the Antitrust Modernization Commission (AMC), which was created by Congress to study any needed changes to antitrust law. In April 2007, the AMC expressly rejected the proposal that the traditional approach to merger analysis, as embodied in the DOJ's and FTC's merger guidelines, treat mergers in high-tech industries too strictly.

With this clear reaffirmation of the core principles of merger law by the antitrust agencies and a congressionally chosen blue ribbon panel of experts, there is no reason we should not go about the business of applying the merger guidelines to all current mergers under review.

Many high-tech mergers involve telecommunications services, and thus the Federal Communications Commission (FCC) gets involved. Technically, the FCC is making a determination, under the Communications Act, as to whether the public interest would be served by permitting FCC licenses and authorizations to change ownership. Although the FCC is not strictly applying the antitrust laws, the agency has faithfully followed the prescriptions of the merger guidelines in each of the last high-profile transactions that it has approved. So long as there is still some wiggle room in the application of the merger guidelines in high-tech industries, however, even an anticompetitive merger might be sold as serving the public interest.

The real problem arises when the desire for the horse trading done in the name of serving the public interest affirmatively subverts the merger guidelines, such that a plainly anticompetitive merger will be approved as long as organized and vocal constituencies can be appeased. In the case of the XM and Sirius merger, which is being reviewed by the DOJ and the FCC, because XM and Sirius are the only two licensed satellite radio providers, the proposed merger would create a monopoly supplier of satellite radio service. Thus, the only way XM and Sirius can gain merger approval is to have the existing merger guidelines not apply to them.

The XM-Sirius merger is unprecedented in its subversion of antitrust principles in another respect. XM and Sirius are exploiting the merger approval process to facilitate what appears to be a horizontal price-fixing conspiracy in violation of section 1 of the Sherman Act. In the hope of

swaying certain FCC commissioners, XM and Sirius have offered to provide their satellite radio channels on an a la carte basis if the merger is approved. But in several interviews with equity analysts since the a la carte offer was announced, senior officials of the two companies pledged their intention *not* to offer satellite radio channels on an a la carte basis if the merger is blocked.

There is nothing that prevents either satellite radio company from offering channels on an a la carte basis today. In antitrust jargon, such pricing therefore cannot be considered a “merger-specific” benefit that counts toward redeeming a merger that reduces competition. XM’s and Sirius’s conditional a la carte offering is properly viewed as an agreement not to compete over the pricing and unbundling of currently bundled content *so long as the two firms operate as separate entities*. Rarely do price-fixing cases contain such conclusive evidence of a meeting of the minds between two competitors to refrain from competing with one another. It is no defense to price-fixing among two currently separate competitors that they are in the process of seeking government approval of a proposed merger to monopoly.

Of course, if the merger is actually approved, XM and Sirius will have succeeded in substituting a stable monopoly for an unstable duopoly. Any losses associated with the a la carte offerings can be subsidized through monopoly profits earned on other customers. If the merger is not approved, then XM and Sirius have tacitly entered into a commitment never to offer satellite channels on an a la carte basis. Heads, XM and Sirius win; tails, consumers lose.

With luck, XM’s and Sirius’s promise not to compete over a la carte offerings will trigger a separate investigation by the DOJ. Meanwhile, let’s hope the FCC and the DOJ stick to their guns, apply the merger guidelines as Democrat and Republican administrations alike have done since the 1980s, and block this anticompetitive merger. The alternative is to gut the merger guidelines for every future deal except the merger of the last two buggy whip manufacturers.

— *J. Gregory Sidak is visiting professor of law at Georgetown University Law Center; founder of Criterion Economics, L.L.C. in Washington, D.C.; and U.S. editor of the Journal of Competition Law & Economics, an international peer-reviewed journal on antitrust law published by the Oxford University Press. He has submitted testimony to the FCC on behalf of the Consumer Coalition for Competition in Satellite Radio in the XM-Sirius merger proceeding.*

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