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ON-THE-RECORD INTERVIEW

With

REED HUNDT

FORMER CHAIRMAN OF THE

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC

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Reported by: Rebecca L. Stonerock, RPR



1100 Connecticut Avenue, NW • Suite 850, Washington, D.C. 20036
Tel: 202.861.3410 • 800.292.4789 • Fax: 202.861.3425
Web: ladreporting.com • E-mail: lisa@ladreporting.com
Additional Offices: Rockville, MD • Baltimore, MD • Greenbelt, MD • McLean, VA

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CONDUCTED ON TUESDAY, NOVEMBER 6, 2007

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On-the-Record Interview With

REED HUNDT

FORMER CHAIRMAN OF THE

FEDERAL COMMUNICATIONS COMMISSION

Held at the offices of:

LATHAM & WATKINS

555 Eleventh Street NW, Suite 1000

Washington, DC 20004

(202) 637-2200

Taken pursuant to Agreement, before Rebecca L.
Stonerock, Registered Professional Reporter and Notary
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A P P E A R A N C E S

ON BEHALF OF XM SATELLITE RADIO:

GARY M. EPSTEIN, ESQUIRE

JAMES H. BARKER, ESQUIRE

Latham & Watkins

555 Eleventh Street NW, Suite 1000

Washington, DC 20004

Telephone: (202) 637-2200

ON BEHALF OF SIRIUS SATELLITE RADIO:

RICHARD E. WILEY, ESQUIRE

Wiley & Rein

1776 K Street NW

Washington, DC 20006

Telephone: (202) 719-7010

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1 P R O C E E D I N G S

2 MR. EPSTEIN: I'm Gary Epstein. I am here
3 representing XM Satellite Radio. Also present is
4 James Barker also of Latham & Watkins representing
5 XM Satellite Radio. Richard Wiley of Wiley Rein
6 LLP is here representing Sirius Satellite Radio.
7 And our witness, our interviewee, is Reed Hundt.

8 Reed is an entrepreneur and investor,
9 serves on various boards. But for this purpose
10 and most relevant, he was Chairman of the Federal
11 Communications Commission from 1993 to 1997, the
12 period encompassing the time when the FCC first
13 authorized satellite radio.

14 INTERVIEW WITH REED E. HUNDT

15 BY MR. EPSTEIN:

16 Q Mr. Hundt, as you know, XM and Sirius have
17 signed a merger agreement to combine the two
18 companies. The merger applications are pending before
19 the FCC. We have asked you to sit for an
20 on-the-record interview to discuss various topics
21 associated with the pending merger. Why did you agree
22 to do this interview?

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1 A I was called by Mel Karmazin after he had
2 announced the proposed merger between Sirius and XM,
3 and Mel asked me if I had any views and if I wanted to
4 express them. I'm not sure, but it's possible that
5 Mel was aware that before the merger was announced I
6 had been interviewed by a reporter for the New York
7 Times and the reporter had asked me hypothetically
8 what would be my view about this merger, and
9 specifically about what the reporter called "the FCC
10 rule" -- that's the reporter's words -- that barred XM
11 and Sirius from merging.

12 And in the interview I told the reporter
13 that -- this is not a quote -- that I thought the
14 Commission and the Department of Justice should have a
15 very relaxed attitude toward this particular merger,
16 if it were ever announced, and that I thought that the
17 circumstances over the ten years since the FCC
18 decisions in question were factually enormously
19 different.

20 In fact, in preparation for this interview
21 I brought the New York Times article in question,
22 which was dated January 20, 2007, and so I will ask

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1 the reporter to attach this as Exhibit A.

2 (Exhibit No. A was marked for
3 identification and attached to the deposition
4 transcript.)

5 A In any event, I told Mel that I would be
6 happy to give my views, but that I would be most
7 comfortable doing them in the context of an interview
8 that was on the record. I did not ask to be retained
9 or to be reimbursed or to be a company expert in any
10 way. I told Mel that I did not want to be.

11 My view is that anyone really ought to be
12 able to ask me what I did when I was in the government
13 on any particular question. You know, when you're in
14 public office and you're doing matters of public
15 record, you kind of make a commitment to hold yourself
16 open to try to explain yourself for the rest of all
17 time. I see Chairman Wiley here and he has adopted a
18 similar view about his decisions and he's been
19 explaining a lot of the important issues from the
20 1970s that he was involved in for the last 30 years.
21 He's explained them to me on many occasions.

22 So I think that it's just a good practice

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1 for government officials to be willing to offer these
2 explanations. And just to be perfectly clear on the
3 record, I'd be happy to answer anybody's questions on
4 this topic. Just happened to be that Mel was the one
5 who asked me. And since we decided -- or since I
6 decided that this would be an interview and on the
7 record, because I happen to be extremely familiar by
8 previous training with the very idea of court
9 reporters, I thought it would be better to transcribe
10 this, and then I can do whatever I want with the
11 interview on the record here and you can do whatever
12 you want with it.

13 Q Thank you very much. Let's talk about the
14 satellite radio proceeding from the mid 1990s when you
15 were Chairman. Can you take us back in time when the
16 FCC was considering the ground rules for satellite
17 radio, and what were the most significant factors
18 relevant to the analysis that the Commission went
19 through?

20 A Yes, I can. I probably couldn't do it off
21 the cuff, but the record should reflect that I asked
22 you to gather certain information so that I could

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1 refresh my recollection. And I think you'll know,
2 Gary, that it's pretty familiar, that I guess I pretty
3 much told you what I wanted you to resurrect from the
4 past and provide me. Because I had a general memory,
5 but I wanted to get it refreshed.

6 Q That's exactly correct.

7 A And I want to thank you for gathering the
8 information that I asked you for.

9 The starting point, of course, is that I
10 was confirmed as the Chairman of the FCC in November
11 of 1993. And that same year -- earlier that year
12 Congress had passed in the Omnibus Budget
13 Reconciliation Act a provision that allowed the FCC to
14 auction spectrum. And I remember very clearly that my
15 chief of staff and I -- Blair Levin and I discussed in
16 the winter of 1993 the following two big things:

17 Number one, that using auctions to expedite
18 and rationalize the distribution of spectrum licenses
19 ought to be something that would obtain bipartisan
20 approval and ought to be something that would make
21 people think, if we did it competently, was an example
22 of good government.

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1 And the other thing I remember is that we
2 looked at the extreme complexity and tremendous
3 controversy of the implementation of the cable act and
4 we thought, well, there's one thing we really ought to
5 be able to do well and there's another thing that
6 we'll just have to endure.

7 So we started early in 1994 getting the
8 Commission organized around the idea of using auctions
9 fairly routinely to grant spectrum. However, the
10 digital audio radio satellite issue, or the SDARS --

11 Q Or DARS, SDARS.

12 A Everything at the Commission has to have an
13 acronym. That issue wasn't really straightforward
14 because years earlier the Commission had asked
15 companies to submit paperwork saying that they should
16 be given satellite licenses to have the satellite
17 distribution of radio. And auctions everybody seemed
18 to be willing to use to implement terrestrial
19 licensing, but when it came to satellites there was a
20 lot of debate about whether satellite licenses should
21 be used in that particular way. So it was not easy to
22 get the majority vote to use auctions to award the

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1 satellite spectrum.

2 However, the one thing that was -- well,
3 again, not easy but pretty straightforward was that
4 Blair and the rest of my team and I felt as long as we
5 were advocating for increased competition in any
6 particular industry, sooner or later we would be
7 likely to gather the votes to mete out new licenses
8 and probably we would be able to use auctions as the
9 technique for doing that.

10 So that's the context in which in 1995, as
11 I recall, we put out a rulemaking on this particular
12 topic of the satellite radio, which we'll just call it
13 "satellite radio," if that's all right with you.

14 Q Sure.

15 A We put out a rulemaking on that particular
16 topic.

17 Now, there's one other thing that you
18 should be aware of in terms of context. In November
19 of 1994 Congress went from democrat to republican.
20 And that was -- of course, after so many decades of
21 having a democratic house that was a pretty big change
22 around town.

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1 In fact, I remember clearly Eddie Fritts of
2 NAB coming to me right before the election and
3 assuring me that this could never happen and that I
4 didn't have to worry about a serious republican
5 oversight. And Eddie was wrong about that. But it
6 wasn't out of revenge, it was rather out of a desire
7 to have enhanced competition that I decided soon
8 thereafter that he would also be wrong about his
9 success in trying to keep the terrestrial broadcasters
10 from having to cope with competition from the
11 satellites.

12 So specifically what I mean is this: In
13 the winter of '94-'95 Blair and I -- this is a year
14 after I got to the Commission -- we decided it's even
15 more important now that we always adopt policies that
16 are driving towards new forms of competition and that
17 we use auctions as the technique. So the -- because
18 we figured those two themes will attract support from
19 the republicans.

20 In fact, there are a lot of republicans we
21 thought who would be very likely to support them when
22 democrats might not. And in fact, looking back, those

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1 two themes did work and that was the reason why we
2 were able to get unanimous or nearly unanimous votes
3 for the rest of my time there, which ended in November
4 of '97.

5 So that's all context. And it wasn't easy,
6 however, with respect to the satellite radio licensing
7 because the terrestrial radio broadcasting business
8 really didn't want to face this competition from the
9 skies. It was a big, big, big issue for them.

10 Q Were there other factors that were involved
11 in the context you talked about by the time that the
12 auctions came around and the '96 act had just passed,
13 and was that relevant in your thinking at all, the
14 actual media issues in the '96 act and what happened
15 almost immediately thereafter?

16 A Well, let's take a look at the timeline.
17 So we've discussed the fact that Congress changed
18 majority control in November of '94, that the
19 satellite radio rulemaking was in June of 1995. So
20 the next big event in the timeline was that the
21 Telecommunications Act in the year 1995 and the year
22 1996 made its way through Congress. And principally

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1 it was done in 1995.

2 Now, very specifically what happened was
3 that Senator Dole had blocked that act in '94 in the
4 hopes that republicans would win the election, which
5 they did. And so it was -- it was done over in 1995.
6 And it was very clear to me all through 1995 that the
7 terrestrial radio industry had tremendous influence in
8 the new Congress. Some people said that that was
9 because talk radio had been an effective organ for the
10 republican party. I really don't know. It's not
11 important. What was clear is that they were very
12 influential.

13 And it was very clear to me through 1995
14 that the terrestrial radio industry was bent on having
15 Congress in the 1996 -- in the act that ultimately
16 became the 1996 act specifically authorize
17 consolidation in the terrestrial radio industry. So
18 consequently, I went down to New Orleans in September
19 1995 and gave a speech at the National Association of
20 Broadcasters radio conference, and in that speech I
21 warned about the impending consolidation in the
22 terrestrial radio industry and I said that -- well,

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1 this is a quote. I asked you to find this speech for
2 me and you did, so I'll quote myself. "Some people
3 think that a counterbalance to overconcentration in
4 local radio will be new competition from digital audio
5 radio service, DARS." And then I went on and said,
6 quoting myself again, "We should let DARS compete with
7 terrestrial. Every instinct tells me that the results
8 of competition will be better radio service for the
9 American public, and there's no reason to assume that
10 terrestrial will do poorly in this competition."

11 So I was trying to, by giving this speech,
12 muster support for the process of auctioning the
13 satellite radio spectrum so that there would be some
14 way to get some competition even when terrestrial
15 radio was, I feared then and I feared correctly as it
16 turned out, able to get Congress to mandate by
17 statute -- not even by commissioning regulations from
18 the FCC -- mandate by statute the authority to engage
19 in very rapid consolidation.

20 So in February of '96 the President signed
21 the Telecommunications Act, and in almost every
22 respect that act empowered the FCC to take -- to issue

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1 regulations that were bent on opening markets to more
2 competition. The one -- the one standout exception
3 was the provisions that basically said, when you
4 boiled them all down, except for terrestrial radio
5 which we really want to allow these folks to
6 consolidate. It had been a very fractionated industry
7 and the leaders in that industry were bent on
8 consolidating to have a very, very rapid concentration
9 and very rapid, as it turned out, concentration in
10 just two big firms.

11 So I was pretty clear with people about it
12 then, and I want to be clear in retrospect, my view
13 all along was that satellite radio was supposed to be
14 some kind of mitigation of this consolidation. It was
15 supposed to be some way to introduce competition from
16 the skies. And looking back on it, I think that it
17 has been only somewhat successful. Only somewhat
18 successful. You look at the market shares in the
19 listening audience market and my belief is that
20 satellite radio is less than 5 percent. Is that your
21 view, also?

22 Q It is also, yes --

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1 A That's only -- that's a -- there's no doubt
2 in my mind that it's competition and there's no doubt
3 in my mind that it's been only modestly successful to
4 date.

5 Q Thank you. So is it fair to say, just in
6 summary on that point, that two very influential
7 factors in setting the market structure rules for
8 satellite radio were what was going on about auctions
9 and what was going on about consolidation in the
10 broadcasting industry?

11 A Yes. Let me put it in my words, but try to
12 be more brief than I was before.

13 I was bent on using auctions as a technique
14 for enabling new competition. Number two, there was
15 not a shadow of doubt in my mind that the competitive
16 force of satellite radio was one of the very few
17 arrows we had to shoot at this elephant-like industry
18 that was going to be created in terrestrial radio.
19 And as I said, looking back over the last ten years,
20 both things proved to be true. It's just that the
21 arrow, if you want to put it that way, of satellite
22 radio has not had a sharp enough point on it.

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1 MR. EPSTEIN: Off the record for a second.

2 (Discussion off the record.)

3 BY MR. EPSTEIN:

4 Q Mr. Hundt, when the Commission adopted
5 rules for DARS there was a statement in the body of
6 the Order itself, but not codified by the Commission
7 in the rules or the Federal Register, and the
8 statement reads, "Even after DARS licenses are
9 granted, one licensee will not be permitted to acquire
10 control of the other remaining satellite DARS license.
11 This prohibition on transfer of control will help
12 assure sufficient continuing competition in the
13 provision of satellite DARS service."

14 Can you talk about the intent behind the
15 quoted language? Why was that language there, and in
16 your view what did it mean?

17 A So you're referring to the Order of March
18 3, 1997 --

19 Q Yes.

20 A -- which, if I recall, even my refreshed
21 recollection is the same thing as the service rules.
22 Isn't that right?

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1 Q Correct.

2 A So the idea here was the following. And I
3 am not claiming ownership of the specific phrasing of
4 the words, but I am taking responsibility happily for
5 the idea that I'm going to describe to you. The idea
6 was that I wanted to have two licenses at the
7 inception of satellite radio so that in the
8 marketplace the owners of these licenses would be able
9 to develop the services that they thought right to
10 optimize value. It was not at all clear to the FCC,
11 and for all I knew it might not be clear to even the
12 owners of these licenses, exactly what they would do,
13 what would the services look like, exactly how would
14 they compete for listeners. And that, of course, from
15 the FCC's perspective is the market to focus on, the
16 market of listeners.

17 Now, our thought was this -- or maybe I
18 should just say my thought was this: Let's start out
19 with these two licenses, since it is not clear exactly
20 what is the optimal business model, and then let's let
21 the two firms go at it for a while and see what
22 happens. But it was never the case that these service

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1 rules were intended to be written concrete or, like
2 the Constitution of the United States, changed only
3 through an elaborate process. It was an attempt to
4 figure out a good way to get the satellite radio
5 industry off to a procompetitive start and then in the
6 fullness of time the FCC and the parties and the
7 people in the industry would be able to see, well,
8 what works and what doesn't work, what's happening and
9 what isn't happening.

10 And as I said to you before and as I said
11 to the New York Times before Mel ever announced this
12 merger, ten years later here's what we can see --

13 Q Was there any intent --

14 A -- we can see that these two firms have
15 made only modest inroads and that it's perfectly
16 reasonable to think maybe a sharper point, maybe more
17 a shaft behind the arrow, would be helpful in terms of
18 having more competition from the skies to terrestrial
19 radio. And then here's the other thing that we can
20 also see: There have been all kinds of other new
21 forms of entry into the market for attention, which
22 also changed the story.

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1 Q So was there --

2 A Let me say one thing about context, too.
3 There was -- I had mentioned earlier that the
4 applications for the -- for these licenses had been
5 filed years earlier. It seemed to me when we were
6 trying to gather the votes for these service rules,
7 which basically are the same thing as the kickoff to
8 the auction, it seemed to me that when we were trying
9 to gather the votes that it was absolutely obvious
10 that we should have a do-over in terms of who wanted
11 to compete for the licenses.

12 After all, the applications, if that's what
13 they technically were called, had been filed years and
14 years earlier under a regime in which it was consumed
15 that the FCC would conduct a kind of beauty contest
16 for satellite licenses and would award them to those
17 that the FCC determined were the prettiest. Remember
18 I mentioned before that that was the way of awarding
19 the licenses prior to the auctions.

20 Well, in the new auction world you don't
21 worry about conducting a beauty contest, you just open
22 the doors with appropriate notice and say to people,

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1 "Go ahead and put your business plans together, raise
2 money behind them and compete for the licenses."

3 Well, I told you I got unanimous votes on virtually
4 everything, but I have to be candid and admit that
5 sometimes I had to compromise to get those unanimous
6 votes. And in this particular case I could not get a
7 majority of the Commissioners to agree to open the
8 auction to everyone. So in fact, if I recall right,
9 there were only four applicants.

10 Q Correct.

11 A Is that right? Do I remember that
12 correctly?

13 Q You are correct.

14 MR. WILEY: That's correct.

15 A There were only four applicants that my
16 other Commissioners would allow to be in the auction.
17 Even now that I think about it it seems completely
18 crazy to me. But the effect of that was the
19 following: It meant that it was not at all as
20 probable, as would have been the case if the auction
21 had been completely open to anyone, that the
22 applicants themselves would be the best and the

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1 brightest and the most empowered of all the people who
2 you might want to have launch this competition.

3 So it seemed to me that one mitigation of
4 that was, well, we'll get at least two licenses out
5 there so that we can have them experiment. But the
6 goal was not to have two instead of one. The goal was
7 to try to figure out what would be the way to get this
8 industry to be the most experimental and innovative so
9 as to mount the most powerful competitive threat
10 against the industry that had 100 percent attention of
11 the listeners for the things we know as radio, and
12 that, of course, is terrestrial radio industrial.

13 Q Are --

14 A Now, let me just say I always say it this
15 way: Like it or not, I'm an antitrust lawyer by
16 training and a former antitrust lawyer by training.
17 From an antitrust lawyer's perspective it doesn't much
18 matter whether there's two licenses or one license.
19 The goal is to have some powerful force from the skies
20 compete against the terrestrial radio business.

21 Q And again, just to point out, our opponents
22 in this merger have argued that the Commission at the

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1 time it adopted the service rules were defining a
2 market of satellite radio and that there would be a
3 high hurdle of some kind to ever change that view and
4 to allow the parties to merge. Is that --

5 A Well, two things. I didn't agree with that
6 at the time. I said it repeatedly. And secondly, I
7 don't agree with it now. I think there's even less
8 support for that idea now than there was then.

9 But point number two, if purely
10 hypothetically one were to say --

11 (Telephone interruption.)

12 MR. EPSTEIN: Off the record.

13 (Discussion off the record.)

14 BY MR. EPSTEIN:

15 A -- that there was a distinct market for
16 satellite radio, then obviously I would have wanted to
17 have three, four or five or six licenses, not two.

18 And I say "obviously" because that's the
19 decision we made at roughly the same time in the PCS
20 business where there was some reason to believe that
21 there was a thing called "the cellular market." And
22 we specifically decided in the framing of the auction

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1 to make sure that there would be at least five, and
2 possibly more, competitors in the market. And when we
3 look at the spectrum caps and other decisions we put
4 in place, that was the goal.

5 So if hypothetically there were a distinct
6 market, we would not have ever said, well, let's just
7 have two licenses. Because as I said before, the
8 difference between monopoly and duopoly, if there were
9 a distinct market, is insignificant from an antitrust
10 perspective. But there wasn't any view that there was
11 that distinct market like that. And, as I said, it
12 seems to me even more obvious now that there is no
13 such distinct market.

14 BY MR. EPSTEIN:

15 Q Well, that's an important point. And so
16 can you talk a little bit about, in your view, what
17 has occurred since the time you set up the market
18 structure rules? Has the landscape changed? What's,
19 in your view -- and I think this is very much in
20 keeping with what you said in the New York Times
21 article. How do you see the competitive landscape
22 now? You were looking to introduce competition to

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1 terrestrial radio, but in your view what's happened
2 since then?

3 A As I mentioned to you earlier, the two
4 firms that have competed now for quite a long time
5 against terrestrial broadcasting have had limited
6 success, but they've had some success.

7 However, in addition, as I think everyone
8 knows just from looking at advertisements or looking
9 at what their kids are doing or buying --

10 MR. EPSTEIN: Off the record for a second.

11 (Discussion off the record.)

12 A -- there are so many new ways fundamentally
13 spawned from digitization and the tremendous increase
14 of processing power per dollar, there are so many new
15 ways to generate and deliver content to listeners that
16 the idea that either satellite radio as a distinct
17 market or that satellite radio is the only competitor
18 against terrestrial broadcasting, neither one of those
19 ideas holds water anymore.

20 Do you want examples? I mean, you can get
21 music off your cell phone, you can get it off of the
22 iPod, you can get it off the many, many versions of

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1 the iPod that are possible.

2 You know, just think for a second about
3 cellular. There wasn't much of a digital cellular
4 industry in the United States in 1995, 1996. I guess
5 it may have been introduced somewhere, but
6 fundamentally it was an analog industry. As an analog
7 industry, it wasn't technically economically feasible
8 for cell phone carriers to introduce music channels
9 into the marketplace or into their offer. It wasn't
10 technically economically feasible for users to
11 download ring tones or music because you'd have to
12 allocate whole channels and you couldn't compress the
13 content.

14 Well, the PCS auctions were not just the
15 introduction of competition into the cell phone
16 business; they were also the introduction of
17 digitization into the cell phone business. And what
18 we see now ten years later is that the cellular
19 infrastructure is capable of delivering -- and
20 consumers do in fact use it to get -- music, the same
21 songs, the same content that you have on terrestrial
22 radio. So that's just an entire infrastructure that

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1 didn't exist ten years ago and is capable now of
2 providing content that competes with terrestrial
3 radio.

4 BY MR. EPSTEIN:

5 Q Given that background and given the recent
6 events, can you comment on the arguments made by the
7 NAB and others that satellite radio is a distinct
8 market and the aspects or the arguments that our
9 opponents have made here are based upon factors which
10 they say distinguish the product market, such as that
11 satellite radio provides programming on a national
12 basis, is subject to different regulatory treatment in
13 connection with indecency, it offers niche
14 programming, it's subscription based and has different
15 public interest obligations.

16 You can either generally or specifically,
17 whatever makes the most sense to you, comment on --
18 both from your policy maker role and, as you stated,
19 your former life as an antitrust lawyer -- on the
20 merits of those arguments.

21 A I don't agree with the NAB arguments. I
22 have to give you a few caveats. I haven't read all of

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1 the evidence in the record. I've read what I think is
2 the principle NAB brief file written by David Solomon
3 and Jane Mago and people that used to work with me and
4 I respect a great deal, and they've put their case as
5 well as it could possibly be put. And they wouldn't
6 have even tried to argue it to me when they were
7 working for me because I would have said, "That's a
8 nonstarter," and they would have known it was a
9 nonstarter.

10 But I'm not impugning them as people, I'm
11 just saying they're as good as you can do, they write
12 as well as you can write and they think as well as you
13 can think about this, but they've got a losing
14 argument, in my judgment.

15 Let me go back a little bit in history. My
16 memory in general is that NAB lobbied, if you will,
17 argued effectively with the other Commissioners in
18 particular to impose a number of limitations on the
19 capability of satellite radio to compete. And those
20 limitations were put into the service rules, I guess.
21 They were put somewhere somehow or other -- or into
22 the licenses.

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1 But let me give you some examples. And
2 correct me if I'm wrong about this, but I believe that
3 they insisted that the digital satellite radio would
4 be subscription based. Isn't that one thing that
5 they -- that happened? Correct me.

6 MR. BARKER: Yes. Off the record.

7 (Discussion off the record.)

8 A So moving on, and anyhow, if I recall
9 correctly, they didn't get a majority vote for that.

10 Second, they argued that the satellite
11 radio couldn't provide local programming. There were
12 a number of nuances to how they did that, but I
13 believe that they did get the votes for that
14 limitation.

15 They made these arguments, in my judgment
16 then and in my judgment now, because they knew that
17 satellite radio was competitive and produced a
18 fungible interchangeable product with terrestrial
19 radio from the perspective of the listener audience.
20 And that was true then and that is true now.

21 Now, I noticed in the NAB-generated
22 material that I read that they argued that terrestrial

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1 radio and satellite radio differ in terms of content
2 because the satellite radio delivers niche
3 programming. You know, there's niche programming all
4 over terrestrial radio.

5 One of the alleged virtues of terrestrial
6 radio consolidation was that under one roof single
7 firms would generate a greater variety and menu of
8 programming. In other words, if I recall correctly,
9 they argued that they ought to be allowed to
10 consolidate terrestrially so that they could offer
11 niche programming. The niche programming is a
12 go-to-market strategy. It is not a distinction that
13 defines a separate product market.

14 NAB also argued that -- has argued, if I
15 recall correctly, that terrestrial radio is subject to
16 indecency regulation and satellites, as long as
17 they're subscription based, aren't subject to
18 indecency regulation. You know, I think the current
19 Chairman, like his predecessors, would tell you that
20 the indecency regulation in terrestrial radio is
21 honored in the breach and that this is not a
22 distinction that makes for a difference in the actual

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1 content, possibly to the horror of the current
2 Chairman and to the regret of many American families,
3 but it's not a regulatory difference that defines a
4 distinct product market, possibly unfortunately from a
5 family perspective.

6 So these are some of the things that I
7 understand NAB has argued. They just don't hold
8 water.

9 MR. EPSTEIN: Off the record for a sec.

10 (Discussion off the record.)

11 MR. EPSTEIN: Back on the record.

12 BY MR. EPSTEIN:

13 Q Thank you very much, Mr. Hundt. The last
14 question we have is do you have any views regarding
15 the proposed merger?

16 A I do. I'm going to give you my caveats
17 first. I'm no longer the FCC chair. I don't even
18 want to be. And I don't think you can sit in that
19 seat -- I don't think you can pretend to sit in the
20 seat when you don't have all the briefings in front of
21 you and you haven't listened to the parties and you
22 don't have people that are looking at all the facts

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1 for you. And so I'm not in any way trying to say, oh,
2 what I think the current Chairman should do. Nor do I
3 have access to the information that the Department of
4 Justice has and I'm not trying to say what I think the
5 antitrust division should do. But you asked me for my
6 views.

7 My views are this: I think that if XM and
8 Sirius combined, it will be procompetitive in all
9 likelihood. It seems to me that that is far more
10 likely than not.

11 It seems to me that what has happened over
12 time is that these two firms have proved when kept
13 apart to be incapable of mounting the really serious
14 competition against -- no pun intended -- the really
15 serious competition against terrestrial radio that I
16 had always hoped for. And it seems to me that there's
17 no indication of any anticompetitive outcome if they
18 do combine, so let's give them a chance to have a
19 sharper point on the arrow and see if they can do
20 better in terms of penetrating the listener audience.

21 MR. EPSTEIN: Thank you very much.

22 Dick, any further questions?

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1 MR. WILEY: No, thank you.

2 MR. EPSTEIN: Thanks very much. Off the
3 record.

4 (Signature having been waived, the
5 Interview of Reed Hundt, was concluded at 9:53
6 a.m.)

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1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

2 I, Rebecca L. Stonerock, Registered Professional
3 Reporter, the officer before whom the foregoing
4 proceedings were taken, do hereby certify that the
5 foregoing transcript is a true and correct record of
6 the proceedings; that said proceedings were taken by
7 me stenographically and thereafter reduced to
8 typewriting under my supervision; and that I am
9 neither counsel for, related to, nor employed by any
10 of the parties to this case and have no interest,
11 financial or otherwise, in its outcome.

12 IN WITNESS WHEREOF, I have hereunto set my hand
13 and affixed my notarial seal this 7th day of November,
14 2007.

15 My commission expires:

16 October 14, 2012

17
18 *Rebecca L. Stonerock*
19 _____

20 NOTARY PUBLIC IN AND FOR
21 THE DISTRICT OF COLUMBIA

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 CONDUCTED ON TUESDAY, NOVEMBER 6, 2007

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HEADLINE: I Want My Howard Stern And Oprah

BYLINE: By JOE NOCERA

BODY:

On Wednesday, I was in the middle of a long phone conversation with Craig Moffett, the Wall Street analyst who follows broadcasting for Sanford C. Bernstein & Company. His purview includes the country's two satellite radio companies, XM and Sirius. Although Mr. Moffett is more positive on XM than Sirius, he sounded a little sheepish when I asked him whether he was bullish on the sector.

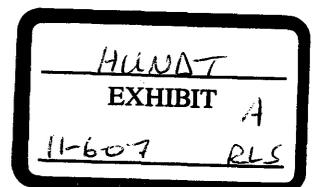
"It's hard to say," he replied. "It's a very good product but the stocks have been such dogs." He continued: "These guys have real challenges."

For months now, Wall Street has been promoting a seemingly simple solution to the problems facing XM and Sirius, including mounting losses, enormous fixed costs and a slowdown in subscriber growth. (Each charges subscribers \$12.95 a month.) The Street would like to see the two companies merge.

Merger speculation has been stoked, in part, by the Sirius chief executive, Mel Karmazin, who has made a number of public comments suggesting that a deal would be good for shareholders. More recently, XM has also seemed to warm up to the idea. Neither company would talk to me about the merger possibility; but just a few weeks ago, a rumor gained currency that XM and Sirius would announce at the Detroit auto show that they were combining. (The rumor was false.)

Just as Mr. Moffett was describing the benefits of an XM-Sirius merger for me, he was interrupted by another call. He put me on hold. When he got back to the phone, he said, "I just heard that Chairman Martin made some negative merger comments."

That would be Kevin J. Martin, the chairman of the Federal Communications Commission, which will have a lot to say about whether the two companies can merge. In response to a question at the end of an F.C.C. meeting, Mr. Martin pointed out that a commission rule forbade



one company from owning both satellite radio licenses.

Almost as soon as the news hit the wire, the stocks of the two companies began tanking.

AS it turns out, Mr. Martin's comments were not as definitive as the early reports suggested. As a commission spokesman pointed out to me -- and as a number of Wall Street analysts wrote to their clients -- Mr. Martin was simply answering a straightforward question about whether such a rule existed. But he also said that if the companies tried to merge, the F.C.C. would take a close look at it.

"The commission can and does change its rules," noted Kenneth Ferree, a former senior commission official now with the law firm of Sheppard, Mullin, Richter & Hampton. Naturally, the stocks of the two companies started to rise again.

It is impossible to know whether the commission would ultimately approve a merger that would allow the satellite radio duopoly to become a monopoly. Normally, any right-thinking person would instinctively be opposed to such a move -- don't we have antitrust laws to prevent mergers that would give companies monopoly power? But the situation with satellite radio raises a question that is becoming more and more important these days: when it comes to new and emerging technologies, what exactly constitutes competition?

There is no doubt that XM and Sirius are fiercely competitive with each other. They have no problem touting their own prospects and denigrating (privately, of course) the achievements of the competitor. Sirius brags about going to 6 million subscribers from 3.3 million in 2006; XM points out that its rival will wind up with a 2006 loss of more than \$1 billion getting to that number. (XM, which has over 7.6 million subscribers, is likely to post a 2006 loss in the \$700 million range.)

Sirius says that it rang up two-thirds of all sales in retail outlets in the fourth quarter of last year, but fails to mention that the retail channel has been dwindling fast. XM notes that quarter after quarter, it gains more "gross subscribers" than Sirius but plays down the fact that because of the percentage of its subscribers that quit the service each quarter, Sirius has, in recent quarters, had more "net subscribers." For two companies that are losing gobs of money, they sure do seem to enjoy trash talking.

They also compete, of course, for content. Most famously, Sirius has Howard Stern, who signed a \$500 million five-year deal with the company and moved his shtick to satellite radio at the beginning of last year. (Last week, the company announced that Mr. Stern had earned an \$82 million bonus, claiming that he brought in far more revenue than he cost the company.) XM has an Oprah Winfrey station. Sirius has professional football and has pried Nascar away from XM. XM has Major League Baseball -- and took the National Hockey League away from Sirius. Both have loads of news and talk and music channels, but XM's channels tend to be more eclectic than Sirius's.

On the face of it, this all sounds terrific for consumers. "Choice is always a good thing," said Ryan Saghir, who blogs about satellite radio at Orbitcast.com -- and opposes the idea of a

merger. But it is not quite as terrific as it sounds. For one thing, what if you are a fan of both baseball and football? What kind of choice is it to have to decide between them? Or what if you like both Howard Stern and Oprah? (Well, O.K., that's not a good example.) It is hard to think of another technology that forces subscribers to make that kind of choice.

More saliently, the primary means by which most people are learning about -- and subscribing to -- satellite radio is through automobile sales. The two companies have lined up most of the major automakers to preinstall satellite radio in some or all of their models. Although Sirius disputes this figure, the general consensus is that XM has 60 percent of the auto business, which is why most analysts think it is the better-positioned company, despite not having Mr. Stern. And nobody chooses a car based on whether it carries XM or Sirius. So the consumer has to opt either for the service that comes with the car or no satellite radio at all. In that sense, Howard Stern matters a lot less than how many car companies the satellite guys can line up.

"When you look at the competition between the two companies," said Blair Levin, a former F.C.C. official who is now an analyst at Stifel Nicolaus & Company, "one can argue that the real beneficiary wasn't the consumer so much as it was the content provider: Howard Stern and the N.F.L."

One can also argue that that form of competition has created financial strains for the companies, especially the free-spending Sirius, making it difficult for what amounts to a niche product to close in on profitability. The obvious appeal of a merger is that it would give the companies the ability to eliminate much of the duplication, while making it far less expensive to sign talent, because the two companies wouldn't be bidding against each other. That strikes me as a consumer benefit.

Of course, the big worry is that if satellite radio ever became a monopoly, the company left standing would have the ability to raise rates with impunity. But that is where we get back to the issue of what its competition really is.

Reed Hundt, the former F.C.C. chairman back when the commission passed its rule preventing a satellite radio merger, told me that when they were preparing to auction the spectrum for satellite radio in the 1990s, it wasn't clear that satellite radio would compete with local terrestrial radio. So the commission wanted to be sure that there were two companies that could compete with each other. But now it is quite clear that satellite radio and terrestrial radio do, in fact, compete. One reason Sirius has never raised its rates -- and XM has done so only once -- is that the competition from free radio keeps prices in check.

And so do other forms of competition, especially iPods. "You can buy an iPod and download music and then plug it into your car," Mr. Hundt said. "How is that different from satellite radio?" Eventually, cars will come equipped with wireless Internet, which will mean all kinds of options for streaming audio content. Once that happens, it seems to me that satellite radio is going to be just another technology fighting to keep pace with the Internet.

Which is also why, somewhat to my surprise, Mr. Hundt believes that the rule he helped formulate should be repealed. "I think we did the right thing to begin with," he said. "You

wouldn't want to change it if it weren't for the fact that it is so obvious that you can get content in so many different ways. That wasn't really true then." As Mr. Levin put it, "Circumstances have changed."

Satellite radio is at a precarious point in its existence. With fewer than 14 million subscribers between the services, it has had a modest impact. Many people -- myself included -- resist the idea of paying a monthly fee for radio, even really good radio. It is impossible to know at this juncture whether that will ever change. But satellite radio is far more likely to be successful if the two companies aren't spending themselves into oblivion, and if one satellite radio company has developed enough financial strength to compete successfully against the greatest business model destroyer ever created: the Internet.

Besides, I like baseball and football.

URL: <http://www.nytimes.com>

GRAPHIC: Photos: Howard Stern, star of Sirius radio. (Photo by Brad Barket/Getty Images)(pg. C1)

Oprah Winfrey has a channel on the XM satellite radio service, which has 7.6 million subscribers. (Photo by Paul Hawthorne/Associated Press)(pg. C9)

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