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March 27, 2008

BY ELECTRONIC TRANSMISSION

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Oral Ex Parte Presentations in Connection With the
Consolidated Applications for Authority to Transfer Control in
Connection With the Sirius/XM Merger, as Amended
(MB Docket No. 07-57)

Dear Ms. Dortch:

On March 27, 2008, the undersigned, Jerry Kilgore and Benjamin Arden of Williams Mullen, representing the Consumer Coalition for Competition in Satellite Radio ("C3SR"), met with Commissioner Michael J. Copps and his senior legal advisor, Mr. Rick Chessen, regarding the above-referenced consolidated applications. The parties discussed C3SR's opposition to the proposed merger of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius").

Reference was made to the recent decision by the Department of Justice ("DOJ") which has been the subject of criticism by many commentators, including the American Antitrust Institute (copy attached). The DOJ decision failed to give proper weight to the substantial evidence of direct competition between Sirius and XM, as summarized in the attached presentation. We also discussed the timeframe and dynamics of Commission action on the merger applications, and how the Commission might address related anticompetitive harms if the FCC ultimately decides to approve the merger. C3SR underscored the necessity of a structural remedy to restore competition and ameliorate consumer harms.

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March 27, 2008

Page 2

Pursuant to Section 1.1206 of the Commission's rules and DA-07-1435, this letter is submitted via ECFS for inclusion in the public record of these proceedings, with an email copy to Commissioner Copps and Mr. Chessen.

Respectfully submitted,


Julian L. Shepard
Counsel for C3SR

cc: (via e-mail)

The Honorable Michael J. Copps, Commissioner
Mr. Rick Chessen



The American Antitrust Institute

FOR IMMEDIATE RELEASE
March 25, 2008

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AMERICAN ANTITRUST INSTITUTE¹ DISHEARTENED BY DOJ'S APPROVAL OF XM-SIRIUS MERGER

(Washington, DC) The American Antitrust Institute today described the Antitrust Division of the Department of Justice's (DOJ) approval of the proposed merger of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio as a reward to the companies for managing to squelch competition between them.

The AAI had pushed the Antitrust Division to conclude that the proposed XM- Sirius merger violates Section 7 of the Clayton Act which requires courts to predict when the effect of a merger "*may* be substantially to lessen competition, or to tend to create a monopoly." The DOJ stated that the merger will not be stopped "because the evidence did not show that the merger *would* enable the parties to profitably increase prices to satellite radio customers." The AAI is alarmed that, with this press release, the DOJ has created a higher standard - replacing "may" with "would" - and focusing only on the effect on prices when such other goals of antitrust as diversity, choice, and innovation are either ignored or shortchanged. Moreover, the DOJ statement suggests it is using a lower standard for alleged efficiencies, accepting them if they "could benefit consumers."

"The DOJ should enforce the law that Congress wrote, not the law they prefer," said AAI President Bert Foer.

The critical decision in this case involves market definition, which the DOJ concluded to be much broader than satellite radio and include a variety of sources of audio entertainment. The AAI believes the market should have been more narrowly defined as satellite broadcast radio. The AAI acknowledges that satellite radio competes to some degree with other modes of entertainment communication. However, the satellite market has many special qualities that set it apart and the AAI believes these qualities have not been given proper weight or consideration in the ruling.

The DOJ reported that it found there is already no competition between the companies in the sale of equipment and service for consumers purchasing cars with pre-installed satellite radios because the companies have long-term exclusive deals with the individual car manufacturers. The AAI fears that this argument results in a DOJ endorsement of a merger to monopoly as long as a large portion of the parties' business is accounted for by long-term contracts.

¹ The American Antitrust Institute is an independent Washington-based non-profit education, research, and advocacy organization. Its mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. For more information, please see www.antitrustinstitute.org. A list of contributors is available on request. The AAI White Paper on this merger is at <http://www.antitrustinstitute.org/Archives/xm.ashx>

The DOJ also stated that XM and Sirius do not compete for each other's existing subscribers because there is no interoperable receiver that will play both XM and Sirius offerings. The AAI finds this to be a particularly weak argument because the providers themselves never fully complied with the Federal Communications Commission (FCC) mandate to develop such a receiver. The DOJ acknowledged that the companies do compete for consumers who purchase aftermarket receivers, but failed to take into account the intensity of the head-to-head competition in this channel, especially on equipment pricing and innovation.

The matter will now proceed at the FCC, where the merging parties have the burden of establishing that competition in satellite radio service no longer serves the public interest. Given the different standards and concerns of the FCC, the AAI believes it is perfectly appropriate for the FCC to reach a different conclusion from the DOJ.

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Antitrust Analysis of the Proposed XM-Sirius Merger

J. Gregory Sidak
Criterion Economics

Hal J. Singer
Criterion Economics

Overview

- Evidence of competition between XM and Sirius
- No evidence of competition between SDARS and AM/FM
- Real choice facing FCC

(Nearly) Identical Pricing Implies Direct Competition

Term	XM	Sirius
< 1 year	\$12.95	\$12.95
1 year	\$11.87	\$11.91
2 year	\$11.33	\$11.33

Satellite Radios Are Similarly Priced

Price	XM Radio	Sirius Radio
<i>Car Radios</i>		
\$150-\$180	CommanderMT, Xpress RC	Sportster 5
\$100-\$110	Xpress R	Starmate 4, Sportster 4, Sportster 3
\$70	Xpress	Starmate 3
\$20-\$60	Xpress EZ, Sportscast	Stratus, InV2 Radio, Sirius InV
<i>Portable Radios</i>		
\$300-\$310	Helix	Stiletto 2
\$200	Inno	Stiletto SL1
\$160-\$170	SkyFi3	Sirius S50
\$150	Pink Inno	Stiletto 10

Other Indicators of Direct Competition

- Sirius announces Howard Stern deal (10/6/04) two days after XM announces Opie & Anthony deal (10/4/04)
- Sirius announces NFL deal (2/4/04) eight months before XM announces MLB deal (10/20/04)
- Sirius announces Spanish language broadcasts of NFL (9/2/05) one month after XM announces launch of Spanish language sports channel (8/9/05)
- Sirius announces women's talk, Cosmo, (9/2/05) four days before XM announces women's talk with Ellen and Tyra (9/6/05)

New Survey Data

- Details are provided in Appendix A
- How do existing SDARS customers respond to a small increase in commercial time by one or both SDARS providers?

Key Findings

- Unilateral five-minute increase in commercials would cause significant defection to rival SDARS provider (21-22%)
- Coordinated five-minute increase in commercials would cause less defection to rival SDARS provider (7-8%), which would be internalized by merged firm

Other Important Findings of Survey

- After Rock/Pop/Hip-Hop/R&B combined, Howard Stern was the most popular station among SIRIUS subs
- Entertainment (E!, Maxim, CourtTV, Playboy Radio) and comedy channels were extremely popular
- SDARS subs are long commuters (nearly 60% have at least a 20 minute commute)
 - Implies that the typical commute could cross AM-FM contours

Evidence Suggests AM/FM Cannot Be Counted on to Constrain SDARS Prices

- CRA regression analysis is weak
 - Even if reliably estimated, the elasticity is NOT price-elasticity
- Sirius-XM internal survey data contradicts Arbitron

Arbitron Survey Shows Terrestrial Radio Is a Complement to SDARS

- “The analysis also showed that satellite listeners are heavy listeners to radio in general including AM/FM radio. Satellite listeners spent an average of 33 hours a week with radio compared with the typical listener who listened approximately 19 hours a week to radio. Also, people who listened to satellite spent more time with AM/FM radio (14 hours) than they did with satellite radio (10 hours 45 minutes) or Internet (8 hours 15 minutes).”
- Arbitron Press Release, Satellite Radio Channels Account For 3.4 Percent of All Radio Listening In Fall 2006 Arbitron Survey, available at <http://www.onlinepressroom.net/arbitron/>.

Real Choice Facing FCC

- Rent extraction does not flow to consumers
- Result would be a highly regulated monopoly provider of SDARS

Implication for Future Merger Review in High-Tech Industries

- Consistency in treatment of market definition in “dynamic industries”
- Repudiation of recommendations of AMC, framework of Merger Guidelines
- Dangerous precedent for future merger reviews

Appendix A: New Survey Data

- Survey of SDARS subscribers conducted Jan. 22-25, 2008
- N = 407
- 49.1 percent were Sirius subs, 40.3 were XM subs, and 10.6 subscribed to both

How would Sirius subs react to a unilateral increase in commercials?

- Q3. If XM did not increase the amount of commercials on its lineup, but Sirius increased its commercials by five minutes per hour on all channels, would you:
 - Remain a Sirius subscriber.
 - Drop Sirius, buy new satellite receiver, subscribe to XM.
 - Drop Sirius, not subscribe to other subscription radio service.
 - Other.

How would Sirius subs react to a unilateral increase in commercials?

	Frequency	Percent
Remain a Sirius subscriber.	153	63.0%
Drop Sirius, buy new satellite receiver, subscribe to XM.	56	23.0%
Drop Sirius, not subscribe to other subscription radio service.	21	8.6%
Other.	13	5.3%

How would Sirius subs react to a coordinated increase in commercials?

- Q4. If both Sirius and XM increased the amount of commercials by five minutes per hour on all channels, would you:
 - Remain a Sirius subscriber.
 - Drop Sirius, buy new satellite receiver, subscribe to XM.
 - Drop Sirius, not subscribe to other subscription radio service.
 - Other.

How would Sirius subs react to a coordinated increase in commercials?

	Frequency	Percent
Remain a Sirius subscriber.	181	74.5%
Drop Sirius, buy new satellite receiver, subscribe to XM.	21	8.6%
Drop Sirius, not subscribe to other subscription radio service.	36	14.8%
Other.	5	2.1%

How would XM subs react to a unilateral increase in commercials?

- Q10. If Sirius did not increase the amount of commercials on its lineup, but XM increased its commercials by five minutes per hour on all channels, would you:
 - Remain a XM subscriber.
 - Drop XM, buy new satellite receiver, subscribe to Sirius.
 - Drop XM, not subscribe to other subscription radio service.
 - Other.

How would XM subs react to a unilateral increase in commercials?

	Frequency	Percent
Remain a XM subscriber.	124	59.9%
Drop XM, buy new satellite receiver, subscribe to Sirius.	45	21.7%
Drop XM, not subscribe to other subscription radio service.	26	12.6%
Other.	12	5.8%

How would XM subs react to a coordinated increase in commercials?

- Q11. If both Sirius and XM increased the amount of commercials by five minutes per hour on all channels, would you:
 - Remain a XM subscriber.
 - Drop XM, buy new satellite receiver, subscribe to Sirius.
 - Drop XM, not subscribe to other subscription radio service.
 - Other.

How would XM subs react to a coordinated increase in commercials?

	Frequency	Percent
Remain a XM subscriber.	143	69.1%
Drop XM, buy new satellite receiver, subscribe to Sirius.	14	6.8%
Drop XM, not subscribe to other subscription radio service.	41	19.8%
Other.	9	2.2%
