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March 28, 2008

VIA E-MAIL AND ECFS

The Honorable Kevin J. Martin, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 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:

I write you on behalf of the Consumer Coalition for Competition in Satellite Radio ("C3SR"), regarding the recent decision by the Antitrust Division of the Department of Justice ("DOJ") to close its investigation of the proposed merger between Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM").[1] According to DOJ, there was insufficient evidence that the proposed merger of the nation's only two satellite radio providers would substantially lessen competition, in part, because there is "a lack of competition between the parties" – particularly competition for existing satellite radio subscribers.[2]

This conclusion is built upon a faulty foundation, ignores the facts of the satellite radio marketplace, and disregards substantial evidence to the contrary provided by C3SR to DOJ. Worst of all, it rewards Sirius and XM with a safe harbor from antitrust enforcement because of their combined non-compliance with the FCC's stated 1997 requirement for interoperable satellite radio receivers. The DOJ decision states, "Because customers must acquire equipment that is specialized to the satellite radio service to which they subscribe, and which cannot receive the other provider's signal, there has never been significant competition for customers who have already subscribed to one or the other service." Thus, we have the anomalous result that a deliberate withholding of interoperable satellite radio receivers from consumers not only does not result in investigation under Section 1 of the Sherman Act, it is blessed with a troublesome merger approval.

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[1] Press Release, Department of Justice Antitrust Division, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008).

[2] *Id.*

Here are the plain facts, which the FCC should not ignore. Direct competition between Sirius and XM occurs on many levels, such as cost (service and devices), content and quality. It is no coincidence that the monthly service cost for both Sirius and XM is $12.95. Similarly, satellite radio receivers offered by both entities are priced comparably, if not exactly the same. There is ample evidence that as one provider added new content, the other provider would quickly add similar content to its line-up.[3] Sirius and XM clearly compete against each other on all these levels to attract new subscribers and to serve existing subscribers.

Perhaps the most compelling evidence of competition between Sirius and XM for existing subscribers comes from subscribers, themselves. According to a survey of existing satellite radio subscribers conducted by NRG Research Group, the results of which were presented to the Antitrust Division on February 7, 2008, a substantial number of existing subscribers would switch satellite radio providers in the face of a unilateral increase in commercial content by their current provider.[4] The existence of a competitive satellite radio provider clearly constrains each provider's ability unilaterally to increase advertising content or otherwise degrade the quality of service. A copy of the executive summary of the survey research is attached for inclusion in the FCC's record.

In my opinion, the DOJ decision reaches the wrong conclusion because it fails to give sufficient, perhaps any, weight to this evidence of direct competition. It would be folly for the FCC to accept DOJ's conclusions without question. The evidence provided by C3SR and other parties of anticompetitive harms to consumers and competitors in the FCC's record is more than sufficient to support a finding of anticompetitive harm resulting from this merger proposal. Approval of the merger in a rubber-stamp manner based on DOJ's decision will permanently foreclose competition in the satellite radio industry and irreparably harm the public interest.

As Steve Pearlstein's article in Wednesday's Washington Post suggests, DOJ's decision on the Sirius/XM merger opens the door to wide-ranging possibilities for future merger proposals, especially in the telecommunications sector. If non-interoperability of consumer hardware is a basis for a finding of "no anticompetitive effects," then a merger to monopoly proposing a combination of Verizon Wireless, T-Mobile, Sprint, and AT&T Wireless, or Apple and Microsoft, is certainly conceivable.

For all of these reasons, I urge you and your fellow Commissioners to exercise great caution in your deliberations on the Sirius/XM merger. Reliance on the DOJ decision alone will

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[3] *See, e.g.,* Consumer Coalition for Competition in Satellite Radio, Petition to Deny 8-11 (July 9, 2007).
[4] An Executive Summary of the survey results dated February 8, 2008 is attached.

only lead to problematic and undesirable outcomes contrary to the public interest. A copy of this letter 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).

Sincerely yours,

Dick Thornburgh

cc: The Honorable Michael J. Copps, Commissioner
The Honorable Jonathan S. Adelstein, Commissioner
The Honorable Deborah Taylor Tate, Commissioner
The Honorable Robert M. McDowell, Commissioner

Attachment

Executive Summary
U.S. National Survey of Satellite Radio Users

February 8, 2008

CONFIDENTIAL DOCUMENT
N=407 SATELLITE RADIO USERS

Overview

Drawing from a large database of American consumers, between January 24th and January 30th, 2008, NRG Research Group identified and interviewed 407 individuals who subscribe to satellite radio. During the 32 question online survey, respondents were asked questions concerning their choice in satellite radio providers, their probable responses to hypothetical changes in satellite radio programming, their typical usage of satellite radio, and their demographic traits. The margin of error for the poll is approximately ± 4.9 points.

Satellite Radio Consumption

Among our sample, 49% of respondents indicated they subscribed to Sirius Satellite Radio while 40% indicated they subscribed to XM Satellite Radio. Nearly 11% of respondents indicated they were currently subscribed to satellite radio from both Sirius and XM.

Most respondents (51%) reported that they listed to music programming via their satellite radio subscription. Another 13% reported that they listen to entertainment programming (comedy, Howard Stern, etc) while 10% listen to sports programming, 9% listen to political/news/financial programming, and 6% listen to "lifestyle" programming (e.g. Oprah, Martha Stewart, etc).

Satellite radio subscribers largely listen to satellite radio programming in their automobiles. Over half of respondents (53%) reported that 60% or more of the time they spend listen to satellite radio is done in an automobile while only 20% reported that 60% or more of the time they spend listen to satellite radio is done in at home or elsewhere besides an automobile.

Response to Programming Changes

Sirius subscribers[1] were asked four hypothetical questions about their continued use of satellite radio given potential programming changes. If Sirius were to increase the number of commercials on its channels by five minutes per hour (assuming no changes in the amount of commercials on XM), 63% of Sirius subscribers would remain with that service while 23% would switch to XM. If Sirius were to increase the number of commercials on its channels by ten minutes per hour (again assuming no changes in the amount of commercials on XM), the changes are more pronounced. Only 42% of current Sirius subscribers would remain with Sirius given the ten minute increase in commercial content while 37% would switch to XM.

On the other hand, Sirius subscribers were asked what they would do if *both* Sirius and XM increased commercial programming. If both Sirius and XM increased commercials by five minutes per hour, 75% of Sirius subscribers would remain with that service and only 9% would switch. If both services increased commercials by ten minutes per hour, 57%

[1] This includes those who subscribe only to Sirius as well as those who subscribe to both Sirius and XM.

would remain with Sirius and only 7% would switch (with over a third choosing to drop their Sirius subscription and not subscribe to XM, essentially leaving the satellite radio market).

Subscribers to XM[2] were also presented with the same four hypothetical questions about programming changes. If XM were to increase its commercial content by ten minutes (with no increase by Sirius), 60% would remain with XM and 22% would switch to Sirius. If XM were to increase commercials by ten minutes (again with no increase by Sirius), 43% would remain XM subscribers and 29% would switch to Sirius.

However, when given hypothetical scenarios in which both providers increase commercial content, XM subscribers largely do not switch. If both XM and Sirius were to increase commercial content by five minutes, 69% of XM subscribers would remain and only 7% would switch to Sirius. If both increased commercials by ten minutes, 53% would remain with XM, 6% would switch to Sirius, and 39% would cease to subscribe to satellite radio.

Conclusion

It appears from this sample that satellite radio subscribers see Sirius and XM as clear competitors. The answers to the hypothetical questions in which both services increase commercial content by ten minutes show that large numbers of subscribers would end their subscriptions should such an increase take place. This suggests that one important reason for subscribing to satellite radio is to avoid commercials.

Thus, when one competitor increases commercial content on its channels, large numbers of subscribers choose the other service. When the increase is more modest (five minutes), the changes are more modest, but still significant and 23% of Sirius subscribers indicating they would switch and 22% of XM subscribers. When the increase is more significant (ten minutes), the changes are more significant: 37% of Sirius subscribers would switch to XM, and 29% of XM subscribers would switch to Sirius.

If, on the other hand, both services increase commercial content, subscribers do not see a reason to switch. Between 7-9% of satellite radio subscribers would feel the need to switch given *both* services increasing commercials by five minutes per hour; if they both increase commercials by ten minutes per hour, between 6-7% of satellite radio subscribers would switch. Clearly, advertising content is one (of perhaps several) factors that help consumers distinguish among satellite radio providers.

Methodology

For this project, NRG Research Group used GMI MR to identify an appropriate universe and randomly select individuals for the sample. GMI MR is one of the biggest panel sample providers in the world; that is, they have access to a particularly large range of sources when recruiting their online panelists. This was essential for the success of this project, which required a representative sample of individuals who subscribe to satellite radio.

GMI takes two steps to maximize the likelihood that they are getting a representative sample of the target population in question. First, GMI works with multiple recruiters who solicit participation in GMI's consumer panel by posting advertisements on websites. These websites are wide ranging but feature sites that a broad range of consumers would visit on a regular basis, such as online directories, etc. Second, those who express interest in joining the panel (for some level of compensation that varies based on the research requirement) are sent a detailed profiling survey. GMI uses this profiling survey to determine who the email

[2] Likewise, this includes those who subscribe only to XM as well as those who subscribe to both XM and Sirius.

invitations for the survey should go to. In our case, they randomly selected – and then emailed – several thousand individuals who were chosen to generate a representative sample of panelists based on age, gender, and region. The online survey instrument further tightened the participant screen by explicitly asking whether or not the respondent was a current satellite radio subscriber – if not, the interview was courteously terminated.

Further, GMI uses several "filters" to assure that the randomly selected respondents are also providing internally valid data. Responses are only accepted from those who received explicit invitations based on GMI's profiling survey. Once engaged in the online survey, GMI employs survey metrics to monitor responses and prevent respondents from engaging in "straight-line clicking" (i.e. mindlessly selecting responses) or "speeding" through questions (i.e. engaging in fast, careless answering).

GMI's email invitations produced 407 interviews, all completed online. Despite the "opt-in" nature of the online panel, there are two reasons to believe the data are representative. First, while opt-in panel designs tend to under-represent lower income and senior populations, neither of those "biases" is germane in this case. Second, the consumer demographic data gathered at the back end of the survey match existing data with respect to who purchases satellite radio. In short, the survey appears to be an excellent representation of a decidedly non-random population: satellite radio subscribers.

Research Team

The principle investigator for this project was Brian J. Brox, Ph.D. Dr. Brox is an Assistant Professor of Political Science at Tulane University. Dr. Brox received his BA in Political Science from Trinity University in 1997 and his Ph.D. in Government from the University of Texas at Austin in 2005. His research focuses on campaigns and elections, political parties, and political behavior, and he has ten years of experience in working with public opinion data in both academic and political/consulting settings.