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April 3, 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 Application for Authority to Transfer Control in Connection With the Sirius/XM Merger, as Amended (MB Docket No. 07-57)

Dear Ms. Dortch:

On April 2, 2008, the undersigned and Benjamin Arden of Williams Mullen and Messrs. J. Gregory Sidak and Hal Singer of Criterion Economics, L.L.C., representing the Consumer Coalition for Competition in Satellite Radio ("C3SR"), met with the following staff members of the Media Bureau and Office of General Counsel: Roy Stewart, Dan Bring, Marcia Glauberman, Jim Bird, Royce Sherlock, Rebekah Goodheart, Dana Scherer, Elvis Stumbergs, David Shiman, Judith Herman, Rosemary Harold, Joel Rabinovitz, and William Freedman. The purpose of the meeting was to discuss C3SR's concerns with the proposed merger of XM Satellite Radio Holdings Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius").

The recent decision by the Department of Justice ("DOJ"), which has been the subject of criticism by many commentators, was discussed. The DOJ decision failed to give proper weight to the substantial evidence of direct competition between Sirius and XM, as summarized in the attached redacted presentation, "Analysis of Proposed XM-Sirius Merger," produced by Messrs. Sidak and Singer.

C3SR challenged the DOJ's assumption that there has been limited switching by subscribers between XM and Sirius because they do not compete for existing customers. DOJ assumes that this lack of switching is caused by the high cost of switching (*i.e.,* the lack of an interoperable radio). To the contrary, consumers have not switched providers because there has not been a triggering stimulus; *i.e.*, consumers have not been prompted to switch because there has not been a unilateral increase in (1) prices above the current level, or (2) commercial time.

Competition between XM and Sirius is the very reason why neither entity has unilaterally increased prices or commercial time, so the FCC should not disregard the harms to consumers that will result from the proposed merger. Competition is the only protection against increases in prices and increases in commercial time on satellite radio.

Also, C3SR discussed the appropriate structural remedies for 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.

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 the above-mentioned meeting participants.[1]

Respectfully submitted,

Julian L. Shepard

Attachment

cc (by email):
Roy Stewart
Dan Bring
Marcia Glauberman
Jim Bird
Royce Sherlock
Rebekah Goodheart
Dana Scherer
Elvis Stumbergs
David Shiman
Judith Herman
Rosemary Harold
Joel Rabinovitz
William Freedman

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[1] Redacted and unredacted copies will also be filed with the Commission pursuant to the FCC's second protective order in this proceeding. *Applications of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. for Approval to Transfer Control,* Protective Order, DA 07-4666 (rel. Nov. 16, 2007). C3SR shall make the unredacted version of the presentation available for inspection at the offices of Williams Mullen, 1666 K Street NW, Suite 1200, Washington, D.C. 20006. Individuals that have executed the appropriate Acknowledgment of Confidentiality should contact Benjamin D. Arden at 202.293.8135 to coordinate access.

Analysis of the Proposed XM-Sirius Merger

J. Gregory Sidak
Criterion Economics

Hal J. Singer
Criterion Economics

REDACTED – FOR PUBLIC INSPECTION

Overview

- Evidence of competition between XM and Sirius
- No evidence of competition between SDARS and AM/FM
- Critique of DOJ's analysis

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(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

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Satellite Radios Are Similarly Priced

Price	XM Radio	Sirius Radio
Car Radios		
$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
Portable Radios		
$300-$310	Helix	Stiletto 2
$200	Inno	Stiletto SL1
$160-$170	SkyFi3	Sirius S50
$150	Pink Inno	Stiletto 10

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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)

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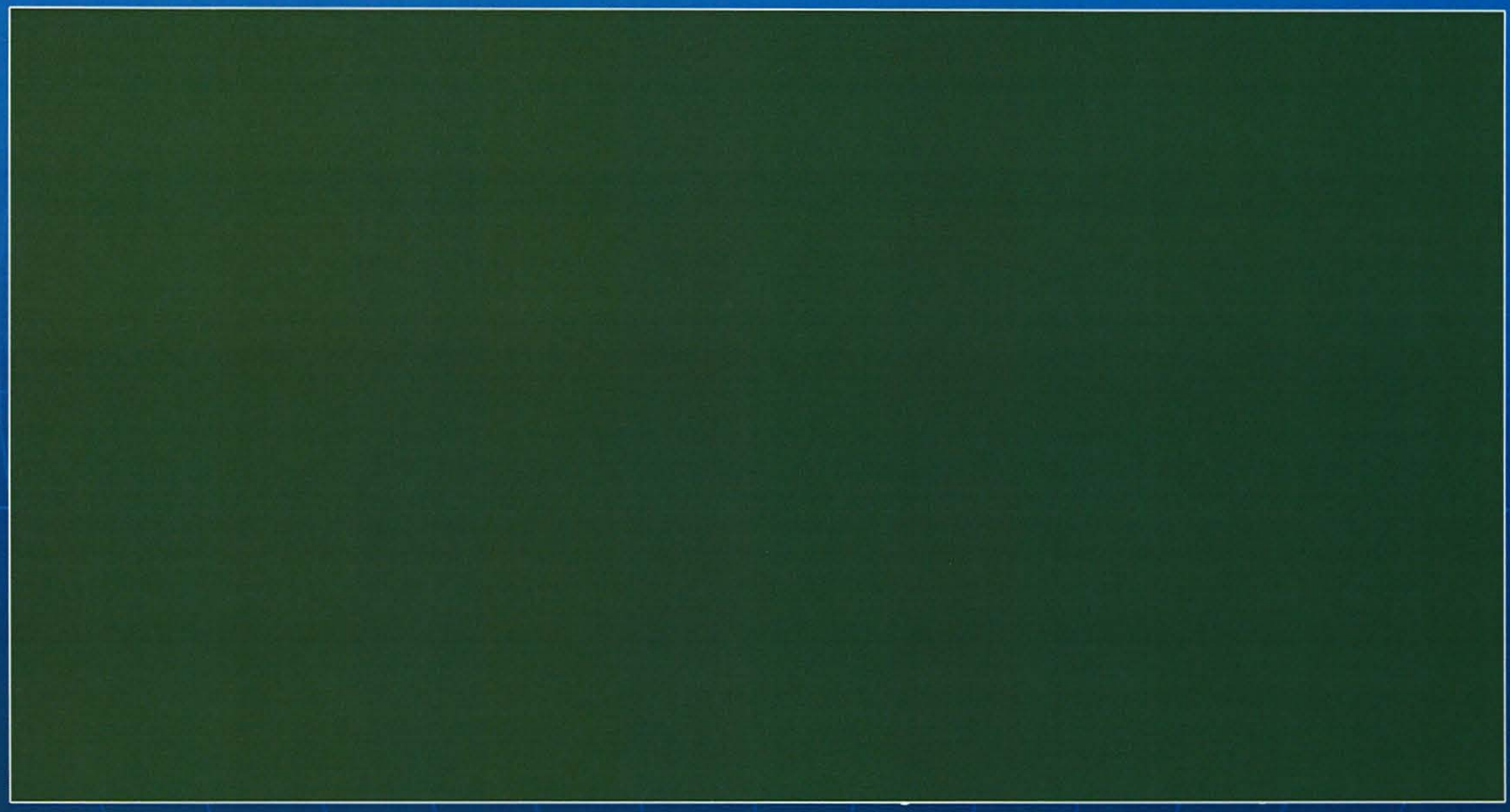
Internal documents reveal competition



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New Survey Data

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

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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

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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

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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

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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/.

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DOJ's Different Standard for XM-Sirius

- Section 7 of the Clayton Act prohibits any merger, "the effect of [which] may be substantially to lessen competition, or to tend to create a monopoly."
- DOJ substituted a **different** legal standard for the incipiency standard in section 7: "After a careful and thorough review of the proposed transaction, the Division concluded that the evidence does not demonstrate that the proposed merger of XM and Sirius *is likely* to substantially lessen competition, and that the transaction therefore is not likely to harm consumers."

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DOJ's Flawed Analysis

- Competition for **existing** customers is over because there is no evidence of switching
- Competition for **potential** customers is also limited
  - Auto channel: Carmakers enter into exclusives
  - Retail channel: Competition from other audio devices; customers with strong preferences for one does not perceive other to be a close substitute

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Competition for Existing Customers

- This is true of any durable good

[redacted]

- **External** survey evidence shows a propensity to switch in response to unilateral quality-adjusted price change
- The two SDARS carriers compete for customers (existing and new) by adding new content

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Competition for Potential Customers: Auto Channel

- Dealers are free to install alternative SDARS system
- Switching cost relative to the price of a new car is trivial
- Survey evidence indicates 22% of customers had the device professionally installed *after* the purchase of a vehicle

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Competition for Potential Customers: Retail Channel

- XM/Sirius have submitted no evidence to show demand-side substitution
- DOJ concludes: Some customers with preferences for exclusive content of XM do not perceive Sirius to be close substitute and vice versa
  - It is impossible to identify price-insensitive customers; instead, marginal customers constrain prices

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Claimed Merger-Related Efficiencies

- DOJ cites fixed and variable cost savings
- Examples of variable cost savings
  - "consolidate development, production and distribution efforts on a single line of radios and thereby eliminate duplicative costs and realize economies of scale."

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