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LEGISLATIVE SERVICE POLICY COMMITTEE

April 18, 2008

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

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Dear Chairman Martin:

I write to you today with further concerns about the proposed merger of XM and Sirius satellite radio companies. The approval of the transaction by the Department of Justice (DOJ) reveals the Department's disregard for the public interest and unwillingness to enforce antitrust law. The full responsibility for protecting the public interest now resides with the Federal Communications Commission (FCC).

I understand that it would be unusual for the FCC to deny such a transaction after the Department of Justice has given its stamp of approval. But I encourage the FCC to take a better look at the facts and not follow the illogical course of the DOJ.

The Department of Justice, whose duty it was to evaluate whether the merger violates Section 7 of the Clayton Act, managed to overlook key aspects of this transaction. They were supposed to examine whether the effect of a merger "may be substantially to lessen competition, or to tend to create a monopoly."

Using a faulty standard, the Department of Justice concluded that the merger would not result in an increase in prices. Yet when the satellite companies no longer compete with one another, there will be no direct competition with the ability to regulate the cost of the satellite radio service. The iPod will not affect the price of satellite subscriptions. Terrestrial broadcast radio will not affect these prices. Cable companies and television broadcasters both provide television content, yet no one can argue that the broadcast companies have been able to regulate the price of cable -- cable prices continue to soar.

Not only will prices rise, but diversity and quality of content will deteriorate. Consumers will not get the best of both worlds if the companies merge. XM and Sirius currently provide their subscribers with a good product -- they offer diverse content and are constantly working to acquire the newest and best programming. Listeners are fortunate that these companies are working to earn their subscriptions -- satellite service offers a great deal more than terrestrial broadcast radio. Consolidation in that sector by companies like Clear Channel has managed to homogenize and decay free over-the-air radio. The same could happen to satellite service when they are no longer forced to compete with one another.

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The DOJ found that there is no competition between XM and Sirius for consumers purchasing cars with pre-installed satellite radios. XM and Sirius currently compete to have their systems installed in cars as a standard feature. The DOJ also blessed the merger in part due to a lack of interoperable radio and their practice of securing exclusive deals with car manufacturers. The Department ignored the competition in aftermarket radio installation, and more importantly, ignored that the FCC originally ordered the companies to develop an interoperable radio and they did not.

The FCC required them to design a receiver which would accommodate all satellite Digital Audio Radio Service (DARS) providers. The FCC order stated: "By promoting receiver inter-operability for satellite DARS, we are encouraging consumer investment in satellite DARS equipment and creating the economies of scale necessary to make satellite DARS receiving equipment affordable. This rule also will promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers." For defying this FCC order and for engaging in this anti-competitive practice of locking in car buyers to one of the two satellite companies, the Department of Justice rewards them with a merger.

Finally, some argue that the merger is necessary to keep XM and Sirius in business. Yet this merger proposal was not presented to the DOJ as a defense of a failing firm. While the companies may have made some poor business decisions in their drive to oust one another, neither is arguing that the merger is necessary to keep them in business. Even if the companies were failing, they should not be rewarded with a government-granted monopoly.

The Department of Justice has arrived at an illogical conclusion. This merger is contrary to the public interest. I hope that the FCC will stand up for competition in the public interest and deny this merger.

Sincerely,



Byron L. Dorgan
U.S. Senator