



April 21, 2008

Hon. Kevin J. Martin, Chairman
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: Application of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. for Authority to Transfer Control, MB Docket No. 07-57.

Dear Chairman Martin:

The American Antitrust Institute (“AAI”) continues to believe that the FCC should deny outright the transfer application of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. for the reasons set forth in our Comments in Opposition to the Transfer dated June 5, 2007.¹ Nothing in the recent decision of the Department of Justice not to challenge the merger (as explained in the Department’s March 24, 2008 press release) has altered our views.²

As the Commission recently noted, “the standards governing [its] review [of mergers] differ from those of the DOJ.” *News Corp. and the DirecTV Group, Inc., Transferors, and Liberty Media Media Corp., Transferee, For Authority to Transfer Control*, 2008 FCC LEXIS 1721, *39, ¶ 24 & n. 85 (citing numerous cases). In this case the standards are starkly different because the applicants must demonstrate that the Commission’s rule barring a single firm from controlling the two licenses for the Satellite Digital Audio Radio Service (SDARS) should be repealed and that the Commission’s long-standing policy of promoting competition in the delivery of spectrum-based communication services should be abandoned. The Department of Justice did not address this issue, let alone offer a compelling reason to think that competition in SDARS is no longer feasible or that a monopoly in the spectrum is preferable to competition.

At most, the Department offered the conclusion that “the evidence does not demonstrate that the proposed merger of XM and Sirius is likely to substantially lessen competition” This standard is incorrect even under conventional antitrust analysis pursuant to Section 7 of the Clayton Act, which bars mergers where the effect “*may be* substantially to lessen competition, or to tend to create a monopoly.” And it is

¹ The comments are available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519517020.

² AAI’s press release in response to the DOJ’s decision is available at http://www.antitrustinstitute.org/archives/files/XM%20Sirius.3.25.08.FINAL_032520081510.pdf

fundamentally different from the standard applicable to the Commission's competitive effects analysis, which requires that the Commission "be convinced that [the merger] will *enhance* competition."³

Moreover, "[a]lthough the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which permits the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies adduce based on antitrust law." *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, 15 FCC Rcd 14032, 14046 n.65 (2000). Accordingly, the Commission need not and should not follow the DOJ's conclusion that the evidence "did not support defining a market limited to the two satellite radio firms," which ignores the extensive evidence of direct, head-to-head competition between the two firms that has benefited consumers.⁴ Nor should the Commission follow the DOJ's analysis of efficiencies, which is particularly unconvincing in light of the fact that the DOJ acknowledged that it was unable to estimate the magnitude of the purported efficiencies with any precision.⁵

Ultimately, the DOJ's conclusion that the evidence does not demonstrate the merger is likely to substantially lessen competition in the future was heavily influenced

³ *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control to NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985, 19987 ¶ 2 (1997) (emphasis added); see also *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and American Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6555 ¶ 21 (2001) (same); Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. CHI. LEGAL F. 29, 49 (noting that FCC, but not DOJ, will block a competitively neutral merger).

⁴ It would not be usual for antitrust experts to reach different conclusions on the definition of the relevant market, as market definition involves a significant degree of judgment, particularly with respect to differentiated products. See Robert Pitofksy, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1812 (1990) ("the determination whether to include a product or cluster of products in the relevant market is almost always based on rough estimates" and "often depends on fact determinations that are largely speculative"); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L. J. 129, 143 (2007) ("The process of market definition involves judgments as to 'matters of degree' that can at times be 'extremely difficult to measure.'") (quoting Pitofsky, *supra*, at 1807).

⁵ Moreover, the DOJ's one example of efficiencies is dubious. It notes that "the merger is likely to allow the parties to consolidate development, production and distribution efforts on a single line of radios and thereby eliminate duplicative costs and realize economies of scale." Yet, it is not clear why this "efficiency" should be cognizable. A single line of radios means a loss of choice for consumers, who have greatly benefited from the competition between the two firms over radio features and capabilities, and a production joint venture is an obviously less restrictive alternative. See U.S. Dept. of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 4 (1997) ("Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.").

Hon. Kevin J. Martin

April 21, 2008

Page 3

by the fact that the parties have already significantly reduced competition between themselves by failing to develop an interoperable receiver (as required by the Commission) and by entering into exclusive long-term distribution agreements with automakers. Whether such developments are appropriately considered under Section 7, they are surely not mitigating factors to be considered by the Commission in evaluating whether to abandon its antimonopoly spectrum policy in SDARS.

Nothing in the DOJ's analysis suggests that the satellite radio firms are unlikely to be viable without the merger, or that satellite radio is effectively a natural monopoly. Accordingly, AAI continues to believe that there is no good reason for the Commission to reverse its policy of ensuring a modicum of intramodal competition in SDARS.

Very truly yours,

Richard M. Brunell
Director of Legal Advocacy

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Marlene H. Dortch, Secretary (by electronic submission)
Gary M. Epstein, Esq.
Richard E. Wiley, Esq.