STATEMENT
of

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on behalf of

COMMON CAUSE
CONSUMERS UNION
THE CONSUMER FEDERATION OF AMERICA
FREE PRESS
MEDIA ACCESS PROJECT

on

XM-SIRIUS AND THE PUBLIC INTEREST

before the

SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

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Common Cause,[1] Consumers Union (CU),[2] Consumer Federation of America (CFA),[3] Free Press (FP),[4] and the Media Access Project[5] urge the Congress, the Federal Communications Commission and antitrust authorities to hold the line against the growing threat to an increasingly homogenized and concentrated media sector: mergers that concentrate ownership in too few hands. The XM-Sirius Radio merger exacerbates long-standing concerns regarding excessive concentration in the media market and the effects of concentration on programmer access and consumer choice. But concerns regarding this merger extend beyond general media consolidation: based on the evidence available today, the proposed transaction is a merger to monopoly in a distinct product market that threatens to increase consumer costs, reduce consumer choice and impede competition. Simply put, this merger is not in the public interest.

The proposed merger of the only two satellite subscription radio companies should raise a red flag for both antitrust officials and communications regulators whose job is to promote competition and consumer choice in the marketplace. Not only were XM and Sirius prohibited from merging as a condition of getting their licenses to use the public airwaves to deliver their services, but also, as demonstrated by the enormous growth of satellite subscription radio service over just a few years, this service is, in fact, a distinct product and could develop into a vibrant competitive market absent the merger. We believe the companies who seek to merge so soon after they began competing and offering consumers innovative new services; so soon after they demonstrated that subscription radio is attractive to consumers and could be more so with consumer-friendly pricing and improved equipment interoperability; and in total disregard of the licensing conditions they accepted in order to use public resources, carry an enormous burden to demonstrate why public officials should

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[1] Common Cause is a nonpartisan nonprofit advocacy organization founded in 1970 by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Now with nearly 300,000 members and supporters and 36 state organizations, Common Cause remains committed to honest, open and accountable government, as well as encouraging citizen participation in democracy.

[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[3] The Consumer Federation of America is the nation’s largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

[4] Free Press is a national, nonpartisan organization with over 350,000 members working to increase informed public participation in crucial media and communications policy debates.

[5] Media Access Project (MAP) is a thirty five year old non-profit tax exempt public interest media and telecommunications law firm which promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow.

abandon all normal rules associated with competitive markets and spectrum licensing to allow this merger.

XM and Sirius have not met that burden. Therefore, the Department of Justice (DOJ) and Federal Communications Commission (FCC) should reject this merger unless and until XM and Sirius present clear-cut facts demonstrating how any of its purported benefits to consumers offset its anti-consumer and anti-competitive harms.

The Danger of an Overbroad Market Definition

This merger raises the most fundamental issues in antitrust law and poses a substantial threat to consumers and competition policy generally. In order to exercise their responsibility under the competition laws, the federal agencies must start from the assumption that the XM-Sirius merger is a merger to monopoly — a merger between the only two firms in the market for national subscription radio service. A proper definition of the relevant product market proves that assumption to be true. But an overbroad definition in this instance would create a devastating precedent for all media competition policy going forward.

The merging parties claim that the merger does not create a monopoly: the existence of cross-platform and intermodal competition means that *all* forms of distribution of audio content are interchangeable, even those that function merely as storage devices, and must be included in the market definition.[6] They assert that national subscription radio service competes, directly and indirectly, with a variety of partial substitutes. Through this overbroad market definition, the merging parties claim that they represent two small fish in a large ocean, rather than the only two fish in a small pond. Such an overbroad definition would have disastrous consequence for consumers of satellite radio as well as both for antitrust and public interest oversight in all media markets generally. By allowing the only two companies selling a specific type of media product to merge on the basis of erroneous claims of cross-platform or intermodal competition, the fundamental basis on which all public interest regulation of broadcast media rests is destroyed.

Concern about the danger of too broadly defining the product market is shared across the ideological spectrum. Gregory Sidak, former Deputy General Counsel of the FCC and Economist to the Council of Economic Advisers in the Executive Office of the President under the Bush Administration, argues:

> *"Broadcasting is more heavily regulated than other media. The FCC has justified that heavier regulation (and lower First Amendment protection) on the basis of four factors: the pervasiveness of broadcast speech, the scarcity of broadcast spectrum, the governmental interest in preserving viewpoint diversity over the airwaves; and the traditional goal of fostering localism in broadcasting. If, however, all aurally*

[6] "Testimony of Mr. Mel Karmazin, Chief Executive Officer, SIRIUS Satellite Radio Regarding Competition and the Future of Digital Music, before the *Antitrust Task Force of the House Judiciary Committee,* February 28, 2007, SEC filing xx, FCC filing xx

delivered media are totally indistinguishable from each other – as XM and SIRIUS claim – and this merger is permitted to proceed on that basis, then it will have been approved on a rationale that would make the inferior First Amendment state of broadcasting untenable. All content and structural regulation of the broadcast industry would be constitutionally indefensible."

Scott Cleland, who describes himself as "a fervent and principled advocate of free markets and competition" reaches the same conclusion with respect to the antitrust laws:

"If the DOJ and the FCC endorse and enable an obvious government-created duopoly to become a monopoly, they would move the goal posts so far from existing precedent that they could not legally justify blocking any merger in the future…

…If the DOJ or the FCC approved this obvious attempt of monopolization, it would be open season on Federal antitrust competition policy."[7]

The importance of understanding the broad implications of the theory that has been offered to justify this merger becomes even more apparent when we consider the position that of the National Association of Broadcasters (NAB) on the merger. While the NAB argues in *this* case that the market should not be defined to include cross-platform and intermodal competition, in the media ownership proceeding ongoing at the FCC, the NAB argues exactly the opposite — a position we have flatly rejected and which is not supported by the evidence.[8] If antitrust authorities accept XM-Sirius' overbroad definition of the mobile listening market, little foundation remains for rejecting NAB's overbroad definition of the media market generally.

Merger to Monopoly

Careful market structure analysis, rigorously applied in all circumstances – media ownership, merger review, and public interest oversight – shows that the overbroad definition of the market offered by XM-SIRIUS is simply wrong. Thus, as both Sidak and Cleland note, the broad definition of the product and geographic market that XM-Sirius and their supporters[9] use is so obviously flawed that an unbiased analysis will easily conclude that the merger violates both the Sherman Act and the 1934 Communications Act as a merger to

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[7] Scott Cleland, "XM-SIRIUS merger is anti-competitive: The Emperor Has NO Clothes," *Precursor Watch,* at 1

[8] See Comments of Consumer Federation of America, Consumers Union, and Free Press, *In the Matter of 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, October 23, 2006.

[9] In congressional testimony, the only public interest group to support the merger has been Public Knowledge, see "Testimony of Gigi B. Sohn, President Public Knowledge, Satellite Radio Regarding Competition and the Future of Digital Music, before the *Antitrust Task Force of the House Judiciary Committee,* February 28, 2007; "Testimony of Gigi B. Sohn, President Public Knowledge Regarding The XM-SIRIUS Merger: Monopoly or Competition from New Technologies," *Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Consumer Rights,* March 20, 2007.

monopoly. The product and geographic market characteristics of satellite radio are easily identifiable and quite distinct from other mobile and stationary audio products. It is national, mobile, programmed radio entertainment. There are two, and only two, entities providing such a service. The alternatives the companies contend are substitutes do not possess this set of characteristics and therefore cannot be said to compete directly with the service. The two services deliver, and require consumers to purchase, huge bundles of well over 100 channels of programmed music, news and entertainment — programming that is nationally available.

We call to the Committee's attention the testimony of David Balto before the Senate Judiciary Committee.[10] Mr. Balto, a former and long-time attorney at the Department of Justice and the Federal Trade Commission who counts among his credits litigation in opposition to mergers such as Staples/Office Depot, Time Warner/Turner and Time Warner/AOL, examined the economic characteristics of the product that satellite radio companies sell. He cautioned that "[s]imply because certain products seem similar to the products being offered by the merging parties does not mean they are in the same relevant product market."[11]

Mr. Balto compared the XM-SIRIUS merger to the proposed Staples/Office Depot merger, which was blocked by the courts, noting that the court concluded that the relevant product market was the "superstore market" not the market for office supplies generally. The relevant product market was properly defined not just by the products being offered, but by the overall shopping experience. The same appropriate analysis applied to the XM-Sirius merger will produce a similar result. Using a similar analysis, Balto concluded that satellite radio is a distinct product:

> "*Although certain parts of the satellite radio package can be acquired through other audio outlets, including web-based radio, digital media services, and terrestrial radio, no other service offers the complete variety of audio entertainment options offered by satellite radio.*"

The relevant market characteristics Mr. Balto identifies are:

- **Aggregating Demand**: Satellite radio has the breadth and depth of programming because it can aggregate demand unlike other forms of audio entertainment;
- **Ubiquitous service**: Satellite radio follows you everywhere. Satellite radio travels with the person, assuring the same level of sound quality or content wherever you are;
- **Product variety**: Satellite radio offers a far greater number of stations than terrestrial radio or even HD radio;
- **Diverse formulated programming**: Satellite radio formats program content to provide diversity, introduce listeners to new music and new forms of entertainment;

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[10] Testimony of David A. Balto regarding The XM-SIRIUS Merger: Monopoly of Competition from New Technologies, *Senate Committee on the Judiciary Subcommittee on Antitrust, Competition and Consumer Rights,* March 20, 2007, at 1

[11] Id.

- **Unregulated content**: The content of satellite radio is not regulated. This permits a wide variety of product offerings to satisfy consumer demand; satellite radio is not regulated or constricted by the rules of the FCC.[12]

Evaluating the market alternatives according to Mr. Balto's criteria, it becomes clear why he came to the conclusion he did. The touted competitors are not competitors in any meaningful sense. There are distinct differences in product offerings, quality, listener experiences, mode of delivery, and regulation. None of the competing services and platforms shares the core characteristics of satellite radio. Each lacks one or more of the core defining characteristics of satellite radio: national service; programmed service; and mobile service.

Terrestrial Radio

Product and market differences created by the varying licensing regimes for satellite and terrestrial radio must be considered when evaluating whether these entities are competitors. Entry into the satellite Digital Audio Radio Services (SDARS) market is restricted by the need to have a license to broadcast at frequencies that enable the service to be provided nationwide. During question at the Senate Judiciary Committee hearing last month, Sirius CEO Mel Karmazin conceded that it was unlikely that another satellite-based competitor would enter the market because of the high barriers to entry. Perhaps because of those barriers and the need to ensure competition existed, the original SDARS licenses were issued by the Federal Communications Commission under strict conditions that the two entities are not allowed to merge.

Differences in federal licensing requirements also demonstrate the clear distinction between satellite radio and terrestrial radio. First, the different restrictions on the licenses demonstrate the market differences. Broadcast licenses require the service to be offered free of charge, requiring advertiser support. Local radio stations adjust their content to the audiences that the advertisers want to reach. Satellite radio licenses allow the licensee to support the service through subscription fees, offering largely commercial-free radio — a distinction that Sirius, in particular, widely promotes.[13] Second, satellite radio travels with the listeners no matter where they are, operating in a national market. But terrestrial radio is a local product; stations vanish as the listener crosses market boundaries. Third, broadcast licenses are subject to public interest obligations, while satellite services are not. As Greg Sidak noted, the licensing differences allow for different market segmentation between the

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[12] Balto, at 5.

[13] Sirius states "The biggest difference is that SIRIUS has 100% commercial-free music free channels. What this means for you is that we offer you music the way it should be and the way the artist intended it: without a single commercial interruption. Our music programming also has a breadth and depth of programming basically unavailable on regular radio. We play songs that you know and love, and many songs that we know you will love when you hear them for the first time. We also have hundreds of exclusive live interviews and performances you won't hear anywhere else and produce many interesting and engaging live talk shows in out national broadcast studios." XM promotes on its website the availability of 69 commercial-free music channels.

two services.[14] Terrestrial radio will never be able to provide some of the programming currently offered on satellite not only because of content restrictions,[15] but also because its licensing requirements limit it to a small geographic market, preventing it from aggregating demand for the types of specialized programming offered on satellite radio. Thus programming on satellite radio tends to be more specialized and more diverse than that of terrestrial radio.

Thus, while it may be true that satellite competes with terrestrial radio in local terrestrial radio markets, terrestrial radio does not and cannot compete with satellite radio in *its* relevant market — the national market. Indeed, XM's tag line is "Beyond AM. Beyond FM. XM."[16] The emergence of HD radio does not change the analysis. In several important ways HD radio is an extension of terrestrial radio. It may solve the quality problem of terrestrial radio, but it carries the other weaknesses (as a competitor to satellite) forward. HD radio is still broadcast to a small local market. It is still subject to content regulation. It also has substantial consumer equipment costs, which traditional terrestrial radio does not. It may expand the capacity of an individual broadcaster a little, but the capacity of local radio still is minuscule compared to that of satellite radio providers.

MP3 Players

IPods and other content storage devices require consumers to access, choose, and download individual selections; they do not provide programmed services. Though they have substantial capacity, the capacity pales by comparison to that of satellite radio. As Mr. Balto demonstrated, the cost of that limited capacity is expensive: "an iPod with 1,000 songs would have approximately $1,000 worth of content or approximately six and a half years of the cost of an XM monthly service."[17] Moreover, the iPod requires affirmative consumer action to access music; it lacks the programmed characteristics of satellite radio where music and information is pushed out to the listeners, exposing them to new content at the flip of a switch. Moreover, the diversity of programming and the capacity of the system which has enabled satellite radio to develop narrowly targeted niche programming lowers the cost of learning about new music. Listeners can go to the genre they're interested in, programmed by a DJ who reflects their tastes, and hear an array of old and new content without commercial interruption. Thus, satellite radio becomes a complement for the iPod (assuming the iPod service provider has the desired song in its library). For example, having heard a new song on

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[14] Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of SIRIUS Satellite Radio, Inc. and XM Satellite Radio, Inc., March 16, 2007, p.6

[15] For example, XM currently offers Laugh Attack, promoted as "Uncensored Comedy;" and Opie and Anthony, two radio personalities whose former on-air performances resulted in FCC fines. Both XM and Sirius offer Playboy Radio, and adult entertainment premium channel. Sirius offers Raw Dog Comedy, which provides uncensored comedy; Maxim Radio, promoted as "Girls, comedy, sports, music: Maxim Radio is the best thing to happen to men... since women!;"and Howard Stern, the shock jock whose performances have resulted in FCC fines. Moreover, both services offer out of market sporting events unavailable on terrestrial radio: Sirius offers the NFL channel and XM offers the MLB channel.

[16] www.xmradio.com

[17] Balto, at 6.

Sirius's eclectic channel "Sirius Disorder," the listener can download it to an MP3 player. Moreover, today, most MP3 players are used for listening to music. They do not generally deliver today programmed non-musical live content: news, sports, talk and other entertainment, which constitutes a substantial part of the programming content on satellite, 40% in the case of SIRIUS. In addition, content from satellite radio is delivered in real time; the listener does not download then listen to it later whenever they want as with iPods and other MP3 players and satellite radio. Finally, the mere fact that both MP3 players are mobile is not sufficient for these products to be substitutes. The merging parties could not with a straight face suggest that built-in CD players function as a substitute: the iPod is a similar device, only with greater storage capacity: it allows consumers to take music and other content they have already purchased and play it in their cars.

The growth in subscribership and revenues for Sirius and XM, based on their SEC 10-5 filings, reinforce the uniqueness of satellite radio's product offerings. Between 2005 and 2006, satellite radio subscribership rose from 9.3 million to 13.7 million — a nearly 50 percent increase. And combined revenue grew by nearly 100 percent. These data are not consistent with a market that competes with the burgeoning market for mobile digital listening devices.

Internet Radio

Internet radio suffers from many of the same problems as terrestrial radio. Much Internet radio is just a redistribution platform for terrestrial radio, which does not break the fundamental constraints of terrestrial radio. The business model still rests on advertising targeted, and content tailored, to the local market for which the terrestrial station holds a license. To the extent that some content is geographically specific (i.e. a home town baseball team) Internet distribution may make it accessible to out-of-market listeners, but it is difficult for the distributor to monetize that broader audience. As a locally based advertising model, aggregation of demand is not possible. Thus, programming that requires a large national audience will be beyond the scope of terrestrial radio rebroadcast over the Internet.

Internet radio that is not based on the output of terrestrial broadcast radio (e.g. music services offered by cellular carriers) suffers several problems. Its quality is questionable and its price is high. And both types of Internet radio also have yet to solve the problem of getting into automobiles, which is the primary market for satellite radio. Even as a stationary alternative, the product is limited by the need for access to broadband, wireless or wireline. Thus, it suffers from bandwidth constraints and substantially higher equipment and service costs. Satellite radio, on the other hand, is ubiquitously available to every consumer at significantly lower monthly costs.

As demonstrated above, the relevant product market for this merger is satellite radio itself. Thus, despite their contentions, the only alternative for XM is Sirius Radio; the only alternative for Sirius is XM. The merger is a merger to monopoly — a type of merger that is antithetical to the competition laws and perhaps the worst offense against the basic principle that competition is the consumer's best friend. There is no circumstance more disturbing from the point of view of the antitrust laws and the Communications Act than a merger within a distinct product market that takes the number of competitors from two to one. That will be the result if regulatory and antitrust authorities accept the erroneous, overbroad market definition.

The False Promise of Bank Shot Competition in Disciplining Prices

If this merger is approved on the basis that different audio platforms are available, consumers will lose: the track record of intermodal competition disciplining anticompetitive abuse is poor at best. "Bank shot competition" — the claim that partial or poor substitutes that are fundamentally different than the target product serve as competitors — has failed to protect consumers in similar situations. The result of relying on such competition in both merger and regulatory reviews has been rising prices and stagnation.

Cable television provides an appropriate example. In the 1980s, federal policymakers claimed that cable TV competed with over-the-air broadcasting. Based on that understanding, the FCC deregulated cable systems in communities with three or more broadcast signals. Cable rates subsequently skyrocketed. By the late 1980s, the failure of this intermodal competition to discipline cable pricing was so obvious that the FCC proposed to increase the number of over-the-air stations necessary to represent effective competition to six. Seeing the results of this failed policy, Congress re-regulated cable in the early 1990s, and intervened in the market to help DBS satellite compete against cable (another form of intermodal competition).

In the decade after the Telecommunications Act of 1996, which largely deregulated cable rates, intermodal competition between cable and satellite failed to discipline cable rate increases. Average monthly cable bills have doubled since the 1996 Act. In short, intermodal competition from neither over-the-air TV nor from digital satellite distribution has disciplined cable rates. The former had more limited channel capacity; the later had greater channel capacity. It did not matter. The empirical evidence from the cable market is clear. Only head-to-head competition of products within the relevant market delivers clear relief from anti-consumer, anti-competitive pricing.

In the satellite radio service product space, we face a similar configuration of products. Congress, regulatory agencies and antitrust authorities should not be misled into believing that traditional broadcast radio, digital Internet distribution and mobile handheld devices, like iPods, that allow consumers to store and play music from their own collections or from online music sites, will discipline prices any more than broadcast television, downloadable videos, DVD players, Digital Video Recorders and direct broadcast satellite have disciplined cable prices. The contention that the purported substitutes will discipline prices is even more suspect when one considers that the cost of satellite radio service has increased since the products were launched several years ago despite the presence of other mobile radio distribution systems. Free terrestrial radio and iPods have been around for a while, but their existence has not prevented increases in satellite radio pricing practices. There is no reason to believe that it will do a better job if a satellite radio monopoly is allowed to come into existence.

The merging parties argue that consumers will be better off with a benevolent monopolist than they would be with two competitors. In this ultra-short term view, competition is defined as wasteful, since redundant facilities lie unutilized. The monopolist can serve everyone while using fewer resources and the monopolist promises not to abuse the market power that would result. But without the stick of meaningful competition, the cost savings simply will not be passed through to the consumer. Indeed, the increase in market power will allow the post-merger monopoly to raise rather than lower prices.

The merging parties promise, in the short-term, not to raise prices for the services that consumers now receive. It is a hollow promise that fails to address the real harms of the merger. Time-limited price freezes today for yesterday's services fail to address the added costs to consumers over time that result when competition is absent. In addition, a short term price freeze does not compensate for the price declines that might otherwise occur if the two competitors continue to compete. In the absence of a merger, it is not clear why prices should not eventually fall below $12.95/month for existing services as increasing subscribership drives down costs. In addition, with the loss of two head-to-head competitors, consumers will suffer from the gradual price creep that will likely occur over time, as in the monopolistic cable industry. Gradual increases, though less noticeable, have a dramatic adverse impact on consumers over time. A five to ten percent annual increase over a period of years takes a significant bite out of the consumer's wallet, as any long-time cable subscriber will attest.

Consumer Choice Denied

XM and Sirius assert that a significant benefit of the merger is greater consumer choice. A careful analysis demonstrates that such choice is badly circumscribed, comes at a cost, and is insufficient to compensate for the loss in choice consumers have now: the ability to choose services from two competitors.

First, XM and Sirius contend that eventually consumers will be able to receive content offered on both systems and in the short term, consumers will be offered some of the content offered on the other competitors system but unavailable from their current service. For example, subscribers currently able to get only the NFL or NLB channels will be able to purchase both. Note, however, that the purported increased choice will come at a cost. The merging parties do not claim to offer those additional channels at the same cost of existing services. The parties offered concession to hold prices near current levels not only does little more than freeze pricing for yesterday’s services, that promise does not apply to new packages that include the combined services of the two companies. In fact, it is very likely that the “merger benefits” of combining these offerings will require consumers to pay much more than $12.95/month to receive premium channels. It is also reasonable to expect that to get those premium channels, consumers would likely be required to "buy-through:" to receive the premium channels at additional cost, consumers may be required to first buy the large basic package.

Second, despite XM and Sirius claims that channel capacity is not a limiting factor, significant concerns exist that to make those additional programming options available, the services will have to drop existing channels, including non-duplicative offerings, reducing consumers' choice, or alternatively degrade audio quality.[18] Channels with specific DJs consumers once enjoyed may be unavailable. In that case, there is little consumer benefit to the merger and substantial costs in terms of lost channel choice. And when dual platform receivers ultimately become available, enabling consumers to receive all channels from both providers, it is unclear what they'll cost and whether the parties will offer them to consumers at reduced or no cost.

Third, the merging parties assert that they'll offer consumers greater choice by offering specialty tiers or give them the ability to opt-out of channels and deduct the cost of those channels from their bill. This choice, however, could be available today. But instead, consumers in the satellite radio space are afflicted by the very same pricing practices that afflict cable consumers. Not only are prices high, but also the consumer is offered only large bundles of channels over which they have no choice. Consumer choice and consumer sovereignty are denied. In a product market where the marginal production cost of adding subscribers is almost zero, the bundling strategy is largely anti-consumer.[19]

This merger promises to make matters worse, with large capacity systems joining to create larger consumer bundles at higher prices. The offer to give consumers greater pricing flexibility is not accompanied by promises that consumers won't be forced to buy-through to get specialty bundles, nor by assurances that the "cost" deducted from consumers for "opt-out" channels will actually reflect the cost of the programming for that channel. The cost to Sirius of Howard Stern's channel, which some listeners may find objectionable, is arguably higher than the cost of a music channel, where production costs are substantially lower. The merging parties' concession not only fails to provide the real channel-by-channel choice consumers demand, it is unlikely to provide any meaningful cost benefits.

The purported choice benefits simply do not compensate for the real choices consumers will lose: the choice between two head-to-head competitors. Today, consumers who want different options have the ability to switch providers, albeit at significant switching costs. But that possibility forces the two providers to continue innovating, improving their services, developing differentiating features like package flexibility, and competing on price. Because this is a unique product market, once the competition is eliminated, the primary driver of innovation and progress in both programming and technology – competition in the market – will be eliminated. Innovation will slow to the pace preferred by the monopolist.

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[18] Charles Babington, "Radio Deal Could Face Technical Difficulties," *Washington Post*, Mar., 19, 2007, at D1.

[19] The marginal production costs are certainly every low, if not zero, but we are told that the marginal transaction costs (i.e. customer acquisition costs) are high. However, it appears that this problem is a function of the bundling strategy. Having set such a high threshold price, the companies are forced to market aggressively to much narrower market segment.

In addition, the merger harms independent content producers, DJs, artists and personalities who now have two competitors to play off one another when negotiating for carriage or "air-time." As we have seen in cable, concentration in distribution reduces access for content producers. Proposals made by some that, as a condition of the merger, some capacity should be reserved for independent non-commercial channels[20] may promote limited content diversity, but it does not compensate for the loss of bargaining power that independent *commercial* content producers will suffer when faced with the market power of a single distributor. At the end of the day, the loss of choice for content producer translates into fewer choices and less program diversity for consumers.

While the merging parties assert the benefit of the merger is greater consumer choice in channel programming offered by both parties, there has been little focus on the fact that it is the parties' own practices that have denied consumers this choice in the past. Despite requirements by the FCC and the terms of their own patent dispute settlement to develop and provide interoperable radios that would have allowed consumers to switch providers without switching equipment, the companies have failed to meet that commitment. Claims by XM and Sirius that they were required only to "develop" the radio, but not to take steps to ensure it was commercially available provides little comfort to consumers denied greater switching choice nor should it ease criticism that these parties sought to comply with only the narrowest interpretation of the commitment. Instead of promoting consumer choice, the merging parties have forced consumers to invest in equipment that works with just one service, and once so invested, their choice is reduced. Today, we are asked to recognize choice benefits of a merger between two parties who have made concerted decisions to deny consumers choice that would otherwise have been available.

For policymakers inclined to accept the notion that consumers are better off with one rather than two satellite radio providers, we recommend that the spectrum occupied by one of the current licenses be divested and made available for other consumer services. If all the nation needs s one satellite radio company, why not auction half of the XM/Sirius spectrum for other commercial uses? Surely a free-market auction would enrich the Federal Treasury with plenty of money to compensate satellite radio subscribers for any sunk equipment costs, offer consumers new broadband or other wireless services, and still enable Sirius and XM to combine their best offerings with substantial channel capacity.

Conclusion

A satellite radio merger to monopoly is about an avalanche of mergers. There was a key moment a decade ago when the Department of Justice decided that a large monopolist is no worse then two smaller monopolists and allowed the Bell Atlantic-NYNEX merger to go forward. That decision opened the door to a wave of mergers that doomed head-to-head competition in telecommunications. The old telephone monopoly was recreated as two huge geographically distinct monopolies that rarely, if ever, compete.

[20] See e.g., Sohn, *supra* note 9.

A satellite radio merger to monopoly will perform a similar bellwether function. If the agencies with oversight adopt a loose definition of products and markets and allow a merger to monopoly on the basis of intermodal competition, then a tsunami of mergers could ripple through the digital space at the worst possible moment. The firms that have declared their undying hostility to the open flow of products in the digital economy (broadcasters, telephone/cellular companies, cable companies), will now be empowered to capture and stifle the alternatives, under the premise that every media and telecommunications product competes with all others and that new technologies and services will come along to protect the consumer in any case. That relief, however, will be slow and insufficient because the competitive core of the digital economy will have been damaged and the critical terrain of the digital economy will be controlled by entities that have the same anti-competitive, anti-consumer objectives as the merging parties in this case.

We urge the Congress to tell the FCC and antitrust authorities to put the brakes on the proposed XM-Sirius merger unless and until significant questions on competition and consumer impacts are fully addressed and satisfactorily answered. It is time to hold the line against the greatest threat to a competitive and diverse media: mergers that concentrate ownership in too few hands.