Public Knowledge

April 10, 2007

Senator Herb Kohl
United States Senate
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
308 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Kohl:

Thank you for your questions and for the opportunity to supplement my testimony on the XM-Sirius merger. I hope that my testimony and my responses here will assist you and the Subcommittee in your investigation of the XM-Sirius merger.

1. At the hearing, you stated you could support the merger if it was conditioned on an enforceable three year price freeze on the prices the combined Sirius/XM could offer after the merger. Why did you choose three years rather than some other time period? Wouldn't allowing the merger subject to such a three year price freeze still leave consumers at risk of price increases after the initial three year period?

First, let me clarify that my suggested three-year price freeze and my other recommended merger conditions would only occur if the antitrust authorities find that there are existing competitors, or likely new entrants in the market that would constrain the new combined entity's prices. If the authorities do not come to such a conclusion, then we would agree that the merger should be denied.

However, if the antitrust authorities do find a broader market, then a three-year period will give developing technologies enough time to become even more compelling competitors to satellite radio, thereby ensuring that prices remain low.

Typically, the antitrust authorities judge potential market entrants by whether or not they will be able to have a market impact within two years of being introduced. I chose a three-year period to provide an even longer time frame for emerging technologies to enter the market, though other time frames might also be appropriate.

I believe that currently developing technologies such as portable music players, mobile Internet services, interactive radio services, and digital broadcast radio will develop significantly in the next three years. At the speed at which technology develops, three years also appears to be a sufficient time frame for entirely new, unanticipated technologies and competitors to develop. For example, a new company called Slacker only recently announced that it would, in the next year, offer a new mobile satellite radio

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service.[1] I find it likely that new other new developments will continue to supplement the growing market in audio content delivery over the next three years.

2. In 2002, the Justice Department filed suit to block the proposal for a merger between the only two satellite TV services, DIRECTV and Echostar. In its lawsuit to block the merger, the Justice Department asserted that-

> **"Echostar and [DIRECTV] compete on a broad array of price and quality characteristics, including programming pricing, programming packages, acquisition of channels, retail compensation, equipment pricing, installation pricing, . . . and targeted promotions. Competition between [DIRECTV] and Echostar has taken the form of measuring themselves against one another, looking to each other when making price and quality decisions, seeking to have a competitive advantage over each other . . . , and imitating competitive improvements that the other has initiated. Consumers have benefited from competition between the two that would be lost after the merger."**

Aren't the same aspects of competition the Justice Department identified as at risk in Echostar/DIRECTV also at risk with respect to the proposed merger between Sirius and XM? Why should this merger be analyzed any differently?

There are several important differences between the inquiry into to the Echostar/DirecTV merger and this one. Not only is the market for multi-channel video programming very different from the market for audio programming, but the options available to consumers have also changed dramatically since 2002. With telephone companies and webcasters providing multichannel video services, I am not certain that the Echostar/DirecTV merger would be denied today.

Second, it could be fairly argued that denying the Echostar/DirecTV merger did not benefit consumers. Supporters of that merger, including several of the public interest groups opposing the merger here,[2] argued that one strong satellite TV company would provide better competition to incumbent cable than two weak companies. However, at the behest of News Corporation, which sought to purchase DirecTV, the merger was denied. As a result, cable prices have continued to go up, and two separate, weak DBS companies lack the capacity to provide a competitive broadband service, which is essential to compete with cable. Nor did the DBS companies have the resources to bid successfully for new Advanced Wireless Services spectrum, which might have given them adequate broadband capacity.

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[1] *See, e.g.,* Erica Ogg, *Slacker's New Wavelength for Satellite Radio*, CNET NEWS.COM, Mar. 13, 2007, http://news.com.com/Slackers+new+wavelength+for+satellite+radio/2100-1041_3-6166934.html.

[2] Comments of Consumers Union, the Consumer Federation of America, and the Media Access Project, *In the Matter of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, before the Federal Communications Commission, CS Docket No. 01-348, Feb. 4, 2002, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513075551.

I see parallels to the DBS merger here – one strong satellite radio company will be able to push radio broadcasters to provide better, more diverse programming and fewer commercials, particularly as broadcasters provide multiple HD radio streams. This competition could be even stronger if satellite radio providers are permitted to do more local programming, which they are currently prohibited from providing, except in narrow circumstances. But two weak companies are unlikely to provide any competitive or political pressure on broadcasters.

3. Sirius and XM argue that satellite radio competes with over the air radio, and that they could not raise prices to consumers after the merger because over the air radio is free. However, critics point out that over the air radio has many differences from satellite radio. Satellite has much more diverse programming; it is a mobile national service; the quality of its signal is much better; and it is largely commercial free. Additionally, satellite radio is unique in that it aggregates demand so that programming that wouldn't be economically feasible in one city is possible when placed on a national service.

What is your view of the significance of these differences between satellite radio and over the air radio? Do you think these differences make satellite radio a different product from conventional over the air radio?

There certainly are differences between over-the-air and satellite radio services. However, these differences are less a matter of the inherent characteristics of a particular service than they are a way for the services to differentiate themselves for competitive reasons. For example, take the fact that the music channels on XM and Sirius do not air commercials. Nothing about satellite radio service or the technology requires those channels to be commercial-free, and indeed when the two services launched in 2001, many of their music stations **did** play commercials. But the services ultimately decided that they could compete better with over-the-air broadcasting if their music services were commercial-free. This commercial-free service has, in turn, caused at least one large broadcast radio owner to limit the number of commercials it plays every hour.[3]

Similarly, there is nothing inherently subscription-based about satellite radio. Indeed, one of the early applicants for an S-DARS license proposed being free and advertiser supported. And digital "HD" radio makes it possible for radio broadcasters to charge subscription fees, and indeed, some are considering that alternative.[4]

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[3] *See* Clear Channel, *"Less is More" Success Continues on All Fronts*, Press Release, May 17, 2005, http://www.clearchannel.com/Radio/PressRelease.aspx?PressReleaseID=1122; Jack Myers, *Clear Channel's Hogan Responds to Karmazin: "Commercial Free and Subscription Free is Powerful Answer to Satellite Radio"*, Mar. 31, 2006, http://www.mediavillage.com/jmr/2006/03/31/jmr-03-31-06/.

[4] I disagree with the characterization of satellite radio's signal as "much better" than over-the-air radio. It certainly may be better than AM, which doesn't play much music in any event, but it is not "much" better than an FM signal. In any event, any small distinction in quality will be erased once more over-the-air stations embrace digital HD radio, which they intend to do over the next several years. *See* Myers, *supra* note 3; HDRadio.com, *Find a Station in Your Area*, http://www.hdradio.com/find_an_hd_digital_radio_station.php (showing, *e.g*, 33 stations in Wisconsin, with more expected).

I think it is an overstatement to say that satellite radio is "unique in that it aggregates demand so that programming that wouldn't be economically feasible in one city is possible when placed on a national service." Broadcast radio can, and does, aggregate scattered demand, with large radio groups broadcasting network or syndicated programs across the country. For example, the largest radio groups command hundreds of stations across the country, and can thus aggregate demand among the different stations they own in each market.[5]

Digital radio, or HD radio, will also compete in providing high-quality audio programming with a wider diversity of content, given the more efficient use of bandwidth. This will allow broadcasting of more niche content, and further aggregation of demand.

Finally, it is important to note that whether or not satellite radio is "different" from over-the-air radio is not the deciding factor in defining whether the products are in the same market. Instead, the relevant question is whether consumers will listen to some other form of audio programming if satellite radio raises prices. Some satellite consumers may well move to broadcast radio, if they are primarily interested in receiving DJ-programmed music or live sports or talk content. Meanwhile, another set of current satellite customers, interested in niche music or programming, may choose to listen to Internet radio, podcasts or other types of recorded content. Such options also have the benefit of a clear signal and lack of advertising.

Nevertheless, these are merely my anecdotal predictions of possible consumer behavior. An authoritative study of how consumers will react to price increases is something that the antitrust authorities will undertake, and if those data show that consumers will not migrate to other platforms, then I would agree that the differences between satellite radio and other forms of audio programming do place them in different product markets.

4. Sirius and XM contend that we should consider new technologies like the I-POD and wireless internet radio in evaluating this merger. But these new technologies all have significant impediments to their ability to compete with satellite radio.

(a) Are I-Pods and other MP3 players properly considered a part of the same market as satellite radio when one considers that it costs about a dollar a song to put music on an I-POD, making using an I-POD to duplicate satellite radio is very expensive? And what is the significance of the fact that little of satellite radio's non-musical content like live sports broadcasts or entertainment programming like Oprah Winfrey or Howard Stern is available for download to an I-POD?

[5] As of the end of 2005, Clear Channel owned 1,184 radio stations across the country; Cumulus Broadcasting owned 300; Citadel Broadcasting 223, and CBS Radio 179. Project for Excellence in Journalism, *Radio Ownership*, THE STATE OF THE NEWS MEDIA 2007, at http://www.stateofthenewsmedia.com/2007/narrative_radio_ownership.asp?cat=4&media=9.

iPods and other digital music players can be loaded with content from a wide variety of sources, not merely tracks purchased from online stores. In fact, the vast majority of songs on iPods come from other sources,[6] such as users' CD collections and freely available podcasts. Roughly 22 songs per iPod have been downloaded from the iTunes store, whereas a 30 gigabyte iPod can hold about 7,500 songs.[7]

Music gathered from users' CDs costs a user nothing more than the price they have already paid for their music. Many emerging artists also provide free digital downloads of their own music from their websites, meaning that consumers can even populate their digital music players for free.

Podcasts—downloadable, digital audio programming—are a significant source of material for digital players. The majority of podcasts are non-music programming, providing news, entertainment, and information to their listeners. These programs, many with hundreds of thousands of subscribers, range from those produced and uploaded by traditional broadcasters[8] to exclusive audio content produced by news outlets and magazines[9] to independent programs[10] developed by amateurs that enjoy massive followings.[11]

Again, like broadcast radio, digital music players will not be an identical substitute for satellite radio. However, the variety, quality, and value of downloadable content is not to be underestimated, and the salient question is whether or not consumers will actually turn to these alternatives in significant numbers in response to a price increase.

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[6] *See, e.g.*, Alex Mindlin, *DRILLING DOWN; Sales of iPods and iTunes Not Much in Sync*, N.Y.TIMES, Dec. 11, 2006, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E01E2DB1431F932A25751C1A9609C8B63.

[7] *Id.*; Apple, *iPod Specifications*, http://www.apple.com/ipod/specs.html.

[8] Examples include an extremely wide variety of NPR programming NPR, *Podcast Directory*, http://www.npr.org/rss/podcast/podcast_directory.php; programming from each of the major television networks and cable news networks; and programming from radio groups like Clear Channel Communications. Mark Mays, *Remarks at the Progress and Freedom Foundation*, http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1233 (noting that Clear Channel programs are among the top downloaded podcasts on iTunes).

[9] Washington Post, *Audio and Video Podcasts*, http://www.washingtonpost.com/wp-srv/mmedia/podcastfront.htm; New York Times, *Podcasts*, http://www.nytimes.com/ref/multimedia/podcasts.html; Wall Street Journal, *Wall Street Journal Podcasts* http://online.wsj.com/public/page/audio.html?; Newsweek, *Newsweek Podcasts*, http://www.msnbc.msn.com/id/7078547/site/newsweek/; New Scientist, *SciPod*, http://www.newscientist.com/podcast.ns; Fidelity Investments, *Fidelity Podcasting Episodes*, http://podcasting.fidelitylabs.com/retail/episodes.php?regionID=RETAIL&progID=Fidelity%20Personal%20Finance%20Podcast;

[10] This Week in Tech, http://www.twit.tv/TWiT; This Week in Media, http://thisweekinmedia.libsyn.com/; DL.TV http://dl.tv/; The MacCast, http://www.maccast.com/category/podcast/; Rules for the Revolution, http://www.rulesfortherevolution.com/; WallStrip http://www.wallstrip.com/theshow/; The *Lost* Podcast with Jay and Jack, http://www.jayandjack.com/.

[11] For an example of the number of downloads per podcast, see Leo Laporte, *Bad Dog, No Guinness*, TWIT.TV, Feb. 13, 2006, http://www.twit.tv/node/4150 (400,000 downloads of an episode of the Ricky Gervais Show; nearly 300,000 downloads for an episode of This Week in Technology).

(b) Is wireless internet properly considered part of the same market as satellite radio when one considers the fact that much of radio listening is done in cars, but devices to listen to wireless internet radio in cars are not widely available today? Are these devices, as well as WIMAX services that reach large distances likely to be available to consumers in the next two years?

As discussed at page five of my testimony, a number of wireless services are provided currently over mobile phone networks. These networks have extensive coverage and can be linked to car stereo systems. Also, the Slacker Internet radio service which I described earlier is expected to start selling a car receiver this Christmas. While few (and especially not I) can accurately predict the development of new technologies, all indications are that these types of wireless Internet radio services will become more widespread over the next several years. However, I cannot predict with any accuracy as to whether they will be available to consumers within the two-year time frame contemplated by antitrust law.

Thank you again for the opportunity to respond to your questions, and I would be happy to provide you with any additional information you require.

Respectfully submitted,

Gigi B. Sohn
President