Testimony of

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Testimony of David A. Balto before the Antitrust Subcommittee of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights. The XM-Sirius Merger: Monopoly, or competition from new technologies?
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I appreciate the privilege to testify before you today about the anticompetitive effects arising from the proposed XM-Sirius merger. As I explain in my testimony, I believe that this merger poses the potential for significant anticompetitive harm in the satellite radio market by combining XM and Sirius, the only two providers of satellite radio. This merger would lead to higher prices, less service, less choice, and less innovation, and should not be approved by the Antitrust Division of the Department of Justice or the Federal Communications Commission regardless of any "regulatory promises" offered by the parties.

I have practiced antitrust law for over 20 years, primarily in the federal antitrust Enforcement agencies: the Antitrust Division of the Justice Department and the Federal Trade Commission.1 At the FTC in the 1990s I was attorney advisor to Chairman Robert Pitofsky and directed the Policy shop of the Bureau of Competition. In private practice and in government service I assisted in the litigation of numerous merger cases including StaplesIOffice Depot, British American Tobacco/American Tobacco, Heinz/Beech-Nut, BPIArco, Nippon SansoISemi-Gas, UPM KymmenneMactac, and SunGard Data Systems/Comdisco. In addition, I provided advice and guidance in numerous media mergers, including the FTC challenges to the Time Warner/ Turner and Time Warner/AOL mergers. My testimony today is based on my years of reviewing proposed mergers as a government enforcer and providing advice and analysis on mergers as a private practitioner.

I want to begin my testimony with some basic principles which I think should guide the analysis of the potential anticompetitive effects of the XM-Sirius merger:
? In antitrust terms, a market is defined by those products or companies which effectively constrain the conduct of the merging parties. Simply because certain products seem similar to the products offered by the merging parties does not
mean that they are in the same relevant product market. The purpose of the antitrust laws is to prevent anticompetitive conduct which may harm consumers; thus, the ability to constrain is essential to the question of which products belong in the relevant market.
? The antitrust laws protect not only competition in terms of price, but also competition in terms of service, choice, and innovation. This is especially important in media mergers, where competition may be primarily in terms of product variety, product offerings, and other forms of nonprice competition.
The antitrust laws, especially the merger laws, protect not only against price increases but also against mergers that may dampen future price decreases. The Clayton Act prevents mergers that

may tend to reduce competition and that includes mergers which may weaken future competition that will lower prices. The most problematic type of merger one that leads to monopoly. The creation of a monopoly is extremely problematic because the decisions by a monopolist to reduce service or increase prices, engage in price discrimination or other possible anticompetitive actions will receive very limited antitrust scrutiny post-merger, if any at all. Thus, antirust enforcement at the merger stage is the only way to protect competition and consumers in the merger-to-monopoly context. Often, regulatory, non-structural, relief is not an adequate substitute for requiring sustained competition between independent parties. The Clayton Act prohibits the attainment of market power by acquisition whether or not that market power is ever actually exercised and regardless of the supposed benevolent intentions of the merged parties. Agreeing to some form of regulatory relief to substitute for competition is a "Faustian" bargain which never pays off for consumers. On the rare occasions where regulators have agreed to these types of arrangements, they have regretted it because they received a brief gift in return for the cost -- in higher prices and less service -- of dealing with a long-term monopoly. For decades antitrust enforcers and courts have recognized that the "benevolent" intentions of a monopolist are not an effective substitute for the rigor of a competitive marketplace to ensure that consumers are not harmed from a merger.

Relevant market
Defining the relevant product market is the central issue in the competitive analysis of the XM-Sirius merger. The parties have suggested the market should be defined broadly to include all forms of audio entertainment such as terrestrial radio, music stored on iPods, radio websites on the Internet, and so forth. If one accepted that definition, conceivably the merger would be unlikely to pose significant anticompetitive affects, because the merged firm's share of the market would be small. If however, the market is defined more narrowly to include only satellite radio, there is a very significant likelihood of anticompetitive effects, since the merger would result in a monopoly. Where should the line be drawn? This is the difficult, but critical question that the Department of Justice and the Federal Communications Commission must answer.

In order to define a relevant market it is important to ask how satellite radio is different from other forms of audio entertainment? Lets start with the information contained on the parties own websites. In its answer to the question of how satellite radio differs from terrestrial radio, Sirius answers:

The biggest difference js that SIRIUS has 100% commercial-free music 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 inteiruption. Our music programming also has a breadth and depth of programming basically unavailable on regular radio. We play the songs that you know and love, and many songs that we know you'll love when you hear them for the first time. We also have loads of original programming. We host h~~ndredosf exclusive live interviews and perfoimances you won't hear anywhere else and produce many interesting and engaging live talk shows in our national broadcast studios.'

Let me identify some additional factors that differentiate satellite radio from other forms of audio entertainment:
Aggregating Demand. Satellite radio has the breadth and depth of programming because it can

aggregate demand unlike other forms of audio entertainment. One of the most important aspects of satellite radio is that it aggregates demand to create the opportunity for new products that might otherwise not exist. As a forlorn fan of the Boston Red Sox exiled in Washington, let me use the example of radio broadcasts of the Boston Red Sox. It is not economically efficient for terrestrial radio stations in the Washington, DC area to broadcast the baseball games of the Boston Red Sox even though there are thousands of Red Sox fans in Washington. That is even more so the case in Boise, Idaho or Cheyenne, Wyoming, where there are only a handful of Red Sox fans. It is not financially feasible for terrestrial radio to serve such small pockets of demand. Satellite radio aggregates this demand to create the opportunities for a new product - the national broadcast of Red Sox baseball. If you look at the program offerings of XM and Sirius you will see countless other examples of niche programs, such as business or children's programming which simply could not exist without the ability to aggregate.
Ubiquitous service. Sattlelite radio follows you everywhere. Satellite radio travels with the person, assuring the same level of sound quality or content wherever you are. Unlike Internet based radio, satellite radio can travel with you in the car, on a hike, or on a beach. And satellite radio assures you the same content wherever you travel. Listening to Congressional hearings may be an acquired taste, but the only way I can listen to them on C-Span radio as I travel outside of Washington is by subscribing to XM radio.
Product variety. Satellite radio offers a far greater number of stations than terrestrial radio or even HD radio. As you know, XM has over 170 channels and Sirius has over 130. In the market with the greatest terrestrial radio stations - Los Angeles - there are only about 90 stations. That overstates their significance for two reasons: one can not hear all 90 stations in all parts of Los Angeles and, unfortunately, even these stations offer relatively homogeneous products. Terrestrial radio basically has six programming formats: news/talklsports, adult contemporary, contemporary hits, urban, Hispanic and country. Think about it: Even in a large cosmopolitan and affluent market such as D.C. there are no commercial classical music stations.
? Diverse, formulated programming. Satellite radio does not just broadcast various forms of entertainment. Rather satellite radio formats program content to provide diversity, introduce listeners to new music and new forms of entertainment. As the Sirius website notes 'No one can match SIRIUS programming. We've got legendary DJs playing your favorite songs on 69 channels of 100% commercial-free music, plus exclusive live performances and artist interviews." a 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. (The fact that Sirius paid Howard Stem an $83 million bonus last year because Sirius added several million new listeners suggests that even Sirius believes that there is consumer demand for such unregulated content).

Based on these product characteristics - aggregating demand, ubiquitous service, product variety, diverse formulated programming, and unregulated content -- there are strong reasons to believe that the appropriate relevant market is satellite radio. It is important to recognize that what these parties offer is a unique service that goes beyond one method of audio entertainment. What XM and Sirius offer is a wide variety of commercial free entertainment, news, talk, weather, local traffic, business radio, live performances, and other audio options in a single format; in other words, the provision of a variety of audio entertainment in a single setting. 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.

Let me compare this to the StaplesIOffice Depot merger, which the FTC successfully enjoined a decade ago. In many ways that merger presented very similar issues to those raised with the proposed XM-Sirius merger. Two parties-Staples and Office Depot-which had developed a novel product that transformed the marketplace sought to merge. The two parties had risked a lot to create the market and often suffered losses. Their success led people to recognize the importance of office superstores. When the FTC announced the challenge to the merger, the parties and most commentators objected; observing that everything that could be purchased in a Staples or Office Depot could be purchased in another type of store or by mail order. In fact, less than 6% of all office supplies were purchased at a Staples or Office Depot. Thus, the parties strenuously argued that an office supply superstore market was far too narrow. But they did not prevail.

The Court observed "that it is difficult to overcome the first blush or initial gut reaction of many people to the definition of the relevant product market as the sale of consumable office supplies through office supply superstores. The products in question are undeniably the same no matter who sells them, and no one denies that many different types of retailers sell these products." But the court explained that "the mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." The Court then observed that the sale of consumable office supplies by office superstores was a relevant antitrust market, based on several factors including industry recognition of an office superstore category, evidence that pricing was far different at these office superstores, and that the stores had distinct formats and customers.

Let me start with just one of those issues - format. Back in 1997, not everyone shopped at office supply superstores and we thought Judge Hogan might have missed the opportunity. So the parties suggested that he visit several stores in Rockville, Maryland including a Wal-Mart, Staples, Office Depot, Target and other stores. The Judge concluded:

Based on the Court's observations, the Court finds that the unique combination of size, selection, depth and breadth of inventory offered by the superstores distinguishes them from other retailers. Other retailers devote only a fraction of their square footage to office supplies as opposed-to Staples or Office Depol. ,,.. . This was evident to the Court when visiting the various stores. Superstores are simply different in scale and appearance from the other retailers. No one entering a Wal-Mart would mistake it for an office superstore. No one entering Staples or Office Depot would mistakenly think he or she was in Best Buy or CompUSA. You certainly know an office superstore when you see one.

The Court effectively concluded that there was an office supply superstore market because what Staples and Office Depot offered was the opportunity to engage in a one-stop shopping experience where a wide variety of office supply needs could be purchased. It was not just the products being sold, but it was the shopping experience that defined the market.

Let me suggest that the members of this Committee do the same: compare satellite radio to the other alternatives. Certainly there are individual offerings of satellite radio you can secure in different modes of delivery. But what satellite radio offers that distinguishes it is the ease of usage, commercial free environment, high quality sound, and the cluster of audio entertainment services in a unique setting. Satellite radio provides consumers the opportunity to secure a wide variety of audio entertainment options in a single setting. For the consumer who might want to listen to sports, Broadway hits, local news, weather and traffic, business radio, live music performances, provocative talk radio, Christian radio and other forms of entertainment, satellite radio is the only alternative. To paraphrase Judge Hogan no one would mistake terrestrial radio for satellite radio.

The second critical issue in defining the market is what products constrain the pricing of satellite radio. Under the Department of Justice Merger Guidelines, the operative question that must be answered is if the merged firm increased prices by a small but significant amount for an extended period of time, what other products might constrain that price increase? In this case, we indeed have some evidence regarding the effects of price increases. During the second quarter of 2005, XM increased its monthly price from $9.99 to $12.95 to bring its price into parity with the price of Sirius-this represented an increase of nearly 30 percent. In the two quarters following that price increase, XM realized subscriber growth of 13 percent (third quarter 2005) and 20 percent (fourth quarter 2005). The fact that subscriber growth continued at such a rapid pace in the presence of 30 percent price increase suggests that other forms of audio media do not restrain prices and satellite radio faces a low elasticity of demand.

Much of the pricing evidence, as in the StaplesIOffice Depot case, is contained within the files of XM and Sirius and is not public. However, I did review the public information available, and could not identify a single new initiative adopted by XM or Sirius in response to iPods, HD Radio, digital media, or other music alternatives. This strongly suggests that satellite radio does not innovate-another form of competition-in response to the product offerings of different music listening formats, and thus these formats, are not part of the same product market.

Fundamentally, the merging parties are arguing that terrestrial radio is an alternative to satellite radio, and thus, in the same product market, because terrestrial radio is free. In other words, they're saying that even a satellite-radio monopolist could not raise prices because it would have to compete with a free service. As I have already shown, the pricing history of Sirius and XM undercuts this argument. Moreover, I do not think that argument recognizes the nature of the unique product offered by satellite radio. Let me provide a comparison. Twenty-years ago Coke attempted to acquire Dr Pepper and that merger was successfully challenged by the Federal Trade Commission. Coke argued that that relevant market included not simply cola flavored carbonated beverages, but rather a broader market of all fonns liquid refreshment, including water. Indeed, the parties there described the market in terms of "share of stomach" and suggested that Coke's and Dr Pepper's share of stomach was relatively small compared to all other liquid refreshment. The Court appropriately rejected that argument, recognizing that water and other beverages were not substitutes for Coke and Dr Pepper, but rather were compliments. Even though water was obviously free, it did not serve to constrain the potential exercise of market power by a combined Coke and Dr Pepper.

Let me provide another example. The parties may suggest that iPods are a competitive alternative to satellite radio. Yet consumers must pay 99 cents for each song downloaded from iTunes, to fill their iPods and must take the time to download the music and select the songs. Thus, an iPod with 1,000 songs would have approximately $1,000 worth of content, or approximately six and half years of the cost of an XM monthly service. Even then, the iPod would not have the selection of XM, nor the sophistication of the DJ mixes the radio content at XM provides, nor the new music that XM can introduce to the listener. The iPod cannot perform the important function of educating listeners by introducing them to new music and new forms of entertainment. I personally prefer the choices of Sirius' talented DJs to my own choices.

Many of these factors have led the Department of Justice, the FTC and the Courts to narrowly define media markets in the past. Here are some of the examples of media markets defined by the agencies:

Cable television programming services (Time Warner/Turner merger (FTC 1996)).
Spanish language radio advertising (Univision/Hispanic Broadcasting (DOJ 2003))
Radio advertising (CBSIAmerican Radio Systems (DOJ 1998))
Movie theatres (Marquee HoldingsILCE Holdings (DOJ 2005))
Multichannel video program distribution (Direct TV/Echostar (DOJ 2002))
Local daily newspapers (McClatchy/Knight Ridder (DOJ 2006))
Alternative weekly newspapers (Village VoiceNT Media (DOJ 2003))
Broadcast TV spot advertising (News Corp./Chris-Craft (DOJ 2001))

Let me just discuss one of these mergers, because I think it illustrates the importance of precisely defining markets in media cases in order to fully recognize consumer preferences. In Marquee Holdings, the Department of Justice and several state attorneys general challenged the merger of the major movie theatre chains in Chicago, Seattle, New York, and Boston. A significant question was whether other forms of entertainment, including the rental or purchase of movies, offered a significant competitive alternative. The Antitrust Division noted that "movies are a unique form of entertainment. The experience of viewing a movie in a theatre is an inherently different experience from a live show, a sporting event, or viewing a TV or videotape of a movie in a home. ... Because going to the movies is a different experience from other forms of entertainment . . . a small but significant price increases for movie tickets generally does not cause a significant number of moviegoers to shift to other forms of entertainment to make the price increase unprofitable." Again there were numerous alternatives to actually going to the movies if one wanted to watch a full-featured film, including free TV and movie rentals, but these were not in the relevant product market because they were qualitatively different and these alternatives were unable to restrain the prices of, watching a film at a movie theatre.

Competitive Effects"
As the Committee is aware, antitrust merger analysis as currently conducted by the Federal Trade Commission and Department of Justice is not simply a matter of counting the number of competitors and calculating concentration. Rather, the agencies have taken upon themselves the obligation of identifying the likely competitive effects of a merger: how the merger will lead to higher prices, less innovation, less choice or less service. Let me begin with a simple observation -- if the market is appropriately defined as satellite radio this is a merger to monopoly - and there would seem to be the potential for significant anticompetitive effects. Obviously, in any market where a firm has a monopoly they have the ability to raise prices and reduce service, choice and

innovation because there are no other entities that could constrain such a change in price or service.

The parties have claimed that their ability to harm competition is minimal regardless of how the market is defined because of the availability of other alternatives such as terrestrial radio, iPods, Internet based radio and HD Radio. Of course, some probative evidence on the potential price constraining effects of these alternatives is likely to be found in the files of the merging parties. And perhaps the parties would like to share those documents with the Committee on a confidential basis. In terms af public documents, I found little to suggest that XM or Sirius responded in terms of price or product offerings with some of these alternatives. When one looks at the specific product offerings between and XM and Sirius we see them primarily responding to each other.

The Justice Department action against the DirecTVIEchostar merger in 2002 is instructive. In that case, the DOJ raised concerns that the merger of those two companies would reduce competition in terms of program prices, program packages, program variety, technology improvements, channel capacity, low equipment prices, installation prices, local channels and targeting each other customers, Of course, satellite television is different then satellite radio. But I believe that in many of these respects, competition between XM and Sirius will be lost because of the merger. Contrary to their public statements since the proposed merger was announced, the companies' track records makes it clear that each views the other as the primary source of competition. This direct competition has kept service prices low, increased the affordability and sophistjcation of satellite radjo receivers, lead to reduced receiver prices, and greatly expanded the-breadth -and variety of- program offerings; Will a monopoly provider of satellite radio continue this trend? History tells us no.

Let's just take for example the question of program variety. When XM comes up with a new form of entertainment channels such as Spanish language sports -- Sirius will carefully evaluate the need to respond to that new form of entertainment. Sirius likely will respond with something similar or another alternative which will attempt to differentiate their product from XM's product, for example, airing NFL games in Spanish.

Product variety, diversity, and choice is an important aspect of competition from the perspective of those who develop content. Imagine for a moment that you are interested in starting a radio channel of talk and news about pets. (After all there is a television channel focusing on pets). Now it is highly unlikely that the economics of terrestrial radio would support such a format, even with the added stations from HD Radio. And a web based format would not have that many listeners, nor is it portable like satellite radio. Currently, the provider of this content would have two satellite radio stations to pitch its content to. Perhaps one of them will take the risk and add the pet radio content in order to differentiate its product from the other. If the merger is approved, however, there will be only one firm dictating what can be found on satellite radio. There will be only one toll booth to the single highway to satellite radio and XMSirius will be the toll keeper. Without rivalry, diversity will suffer and the incentive to differentiate and innovate will be significantly dampened.

Before we leave the issue of competitive effects let me focus on one more important issue - can there be competitive concerns if the market is defined broadly to include other technological alternatives? The answer is yes. Antitrust law is clear that there may be competitive concerns from a merger in a broadly defined market where the merged entities are close rivals and the merged firm would be insufficiently constrained by others and could raise prices or reduce choice or service without fear of losing a sufficient number of customers to make such conduct unprofitable. This is called "unilateral effects." Unilateral effects analysis asks whether the merging parties are each other's closest competitors, and whether, post-merger, another firm could fill the lost competition that was created by the merger of the two parties.

Regardless of whether terrestrial radio, HD Radio, and iPods are part of the "relevant market," the antitrust laws ask whether the elimination of XM or Sirius will give the merged firm a greater ability to act unilaterally to raise prices, reduce service, choice or innovation. Practically, the answer must be "yes." Head to head competition between XM and Sirius is critical to the market. As the Sirius 10-K observes: "We compete vigorously with XM Radio for subscribers and in all other aspects of our business, including the pricing of our service and our radios, retail and automotive distribution arrangements, programming acquisitions and technology." None of the other audio entertainment alternatives, even if they were part of the same market could step in the shoes to replace the lost competition between XM and Sirius. None can offer unregulated content because of FCC regulations. None can aggregate demand and offer national radio programming opportunities to listen to Red Sox games as I discussed above. None offer a broad array of music and other premium content. None offer subscription services. In short, the merger will leave a gaping hole in the market, and the merged entity will be unconstrained in its ability to raise prices or reduce choice and service.

Entry

The parties appear to argue that new forms of technology will be able to effectively restrain their ability to increase prices post-merger. The Merger Guidelines suggest that entry may be a significant countervailing factor to constrain a price increase if that entry is likely, timely, and sufficient to forestall anticompetitive conduct. The time horizon for such entry, according to the Department of Justice and the courts, is two years. Of course, the parties are not suggesting that there can be new entry into satellite radio because of the regulated nature of the business.

Rather the parties focus on technological change. There certainly is significant technological change in broadcasting, including the development of high definition radio and digital media. However, even these nascent alternatives cannot provide the wide variety of products of XM and Sirius. It is probably several years until HD Radio is widely available in the market. Other alternatives, such as internet-based radio, may provide individual alternatives for individual product offerings but is not automobile based. None of these alternatives can perform all the essential functions of satellite radio -- aggregating demand, ubiquitous service, product variety, diverse formulated programming and unregulated content. Thus, it is unlikely they can enter within the 2-year period and effectively restrain prices. A promise of potential entry is insufficient to approve potential anticompetitive effects of the merger.

Efficiencies

The parties have suggested that there are significant efficiencies that may result from the merger. Certainly, as in any situation where there is strong rivalry between two firms, consolidating services may reduce cost. It is important for the Committee and for antitrust enforcers to recognize the limited circumstances in which efficiencies can justify an otherwise anticompetitive merger under the antitrust laws. Those efficiencies which are considered under the antitrust laws are solely those efficiencies which lead to improvements for consumers in terms of lower prices, greater innovation or greater service. Moreover, an efficiency must be merger specific - that is it can not be achieved in any less anticompetitive fashion. When a cost savings does not result in those benefits to consumers it is not properly considered.

Let me provide an example on merger specificity. The parties suggest that the merger will be procompetitive because it will permit a listener to enjoy the programs of both XM and Sirius. For example, they suggest that a listener will be able to listen to both Major League baseball and the National Football League or Martha Stewart and Oprah. Of course, the parties do not need a merger to share content - they already share some content. There is no reason why content must be exclusive.

There are two main reasons the parties' efficiency arguments should not justify the merger. First, the argument that it is efficient to eliminate programming overlaps ignores the competition between Sirius and XM to secure quality programming. Providers of programming are likely able to play Sirius and XM off against each other to secure favorable access to satellite radio. The antitrust laws are concerned with this competition as well. Second, it ignores the fact that many of these programming additions were brought about because of the arms race between Sirius and XM. For example, Spanish-language sports programming may never have come to satellite radio absent competition between the parties.

Moreover, efficiencies typically are considered only to the extent that the cost savings will be passed on to consumers in lower prices and better service. I have a simple question: If XM-Sirius becomes a monopolist, why will it have any incentive to pass on these cost savings in benefits to consumers? We have only the parties' word that he will do so. Historically, that has been insufficient to satisfy the Clayton Act's standards.

The Promise of a Benevolent Monopolist

Finally, the merging parties suggest that they are willing to consider practically any type of regulatory decree to protect the interests of consumers. For example, they have suggested a promise of a certain level of service or promise a cap on price increases. Let me be clear about this: under the antitrust laws, regulation is not a substitute for competition. Competition is a vastly more effective way of allocating resources and assuring consumers receive the benefits of a competitive market place. Regulation, especially regulation based on a promise by a benevolent monopolist, cannot substitute for that competition. That is why in countless cases, courts have rejected promises by merging firms not to increase prices. In some instances, primarily local hospital mergers, some state antitrust enforcement officials and one court have permitted mergers based on promises not to increase prices. Ultimately, this has been a Faustian bargain which the communities in these markets have learned to regret. A monopoly is forever. After the period of quasi-regulation has expired, those communities have suffered lower service and higher prices.4 And the difficulty of regulating markets is one problem that the Department of Justice is ill-equipped to handle-the antitrust agencies do not have the capacity to act as centralized enforcers of market pricing. Indeed, such regulation runs directly contrary to our entire economic structure and the purpose of the antitrust laws. Moreover, the history of regulation of the cable TV industry - which has been plagued with consistent price increases unrelated to costs -- shows that regulation is an extraordinary poor alternative to a competitive market.

And this promise not to raise prices should be irrelevant anyway. The merging firms already have already discussed increasing prices, in the form of tiered pricing. Today, the merging parties promise that the post-merger price for all stations on XM and Sirius will be less than the cost of purchasing XM and Sirius separately, but in essence, they are saying that postmerger consumers will bear the cost of new programming, which runs contrary to the state of competition today. When XM took the NHL from Sirius did subscription prices increase for XM because of the new programming? No. When XM added Oprah Winfrey, did prices increase for XM services? No. When Sirius added NASCAR, did the price of a Sirius subscription increase? No. Why not? Because an increase in price may have led consumers to switch to the other satellite radio. But if the merger is permitted when new services are added, by combining best of-breed programming from Sirius and XM post-merger, consumers will bear the cost of the new services, because the merged entity will no longer face competition for new subscribers. Thus any promises about tiered pricing is no more than a promise no to increase prices "too-much"-- but, rather, just enough to fuel the profits of the post-merger XM entity.

As a policy matter permitting a merger based on a promise not to increase prices is poor antitrust policy. As two former FTC enforcers stated: As a policy matter, antitrust enforcers and the courts have been reluctant to pennit anticompetitive mergers to occur based on the promise of the parties not to increase prices. . . . As the U.S. Supreme Court has pronounced, the antitrust laws rest "on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." N.C.A.A. v. Board of,Regents, 468 U.S. 85, 104 n.27 (1984). Courts have recognized that prices set by agreement are no substitute for competition. As explained by the Court in United States v. Trenton Potteries Co.: "The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." 273 U.S. 392 (1927).

[A]ny agreement providing a price cap offers no protection against the elimination of non-price competition. "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain--quality, service, safety, and durability--and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." National Soc'y of Prof1 Eng'rs v. United States, 435 U.S. 679, 695 (1978). Permitting an anticompetitive merger to occur based on a promise not to increase prices would insulate the allocative decisions from the self-governing forces of competition and place them within the sole control of merged firm. Moreover, without the drive to compete, there is no certainty efficiency benefits would be passed on to consumer. That is why courts almost uniformly reject offers to cap prices in response to an anticompetitive merger. A good example of this was Judge Sporkin's decision in FTC v. Cardinal Health, in which the court enjoined two mergers of the four largest drug wholesalers in the market. The parties proposed a price cap and Judge Sporkin actually had the parties mediate whether a price cap would work. Ultimately the court rejected the defendants' promise as an antidote to anticompetitive effects, because resorting to a "price cap" would have effectively deprived consumers of the lower prices and improved service that would derive from competition: The Defendants' promise not to raise prices fails to ensure that prices will continue to fall after these mergers--or fall by the amount they would have absent the mergers. This Court is not convinced that the Defendants would still vigorously compete with one another after the mergers to continue lowering their prices. In the absence of real competition, it is concerned that the prices set today could in effect become the floor tomorrow.

Conclusion
In respects the promises of the merging parties remind me of a scene from Frank Capra's famous movie It's a Wonderful Life. At a critical moment, Mr. Potter, the owner of the dominant bank in Bedford Falls tries to get George Bailey, the owner of the only rival bank, to sell out to him. He points out that once they have merged, Mr. Bailey will be able to offer his family the type of comfort and stability that he will otherwise have to struggle for. Of course, we know from the movie what would have happened if George Bailey had accepted Mr. Potter's offer: the town would have become servant to Mr. Potter's bank as it became a monopolist and the town would have lost the benefits of competition that led to affordable housing, new small businesses and countless other benefits for consumers. I am not suggesting that the management of XM and Sirius have the nefarious desires of Mr. Potter; however, Mr. Capra teaches an important lessen for antitrust enforcers and this Committee: it is only competition that can guarantee consumers the full range of benefits in low prices, better services and greater choice. Nothing can replace competition. I appreciate the opportunity to testify and look forward to your questions.

1 My testimony represents my own views and not those of any clients. I do not represent any clients with any interests in the XM-Sirius merger.

2 Both the Sirius and XM websites explain how satellite radio is different from terrestrial radio. They do not address other supposed alternatives such as iPods, HD Radio, or web based radio. This suggests that the merging parties do not perceive these as significant alternative forms of competition.

3 My analysis solely focuses on the impact on consumers. However, there can be anticompetitive effects for others including content providers and advertisers. XM's Internet site actively solicits advertisers noting the value of its product offerings for advertisers.

4 David Balto and Meleah Geertsma, "Why Hospital 'Merger Antitrust Enforcement Remains Necessary: A Retrospective on the Butterworth Merger," 34 Journal of Health Law 129 (Spring 2001).

5"khard Parker and David Balto, "The Merger Wave: Trends in Merger Enforcement and Litigation" 55 Business Lawyer 35 1 (November 1999).