Analysis of Antitrust Concerns Regarding XM/Sirius Merger

This memorandum sets forth an initial analysis of the competitive effects of the proposed XM/Sirius transaction and identifies consequences of the merger that appear likely to substantially lessen competition in violation of antitrust law. This analysis is based on publicly-available sources regarding the parties, the transaction, and the industry in general. We will continue to refine our analysis as additional facts become available and arguments are developed.

I. Introduction

The proposed merger of XM and Sirius will combine the only two providers of satellite digital audio radio service ("satellite DARS"). The parties claim that DOJ should not be concerned about this merger to monopoly, because there are other suppliers in the purported market for audio entertainment. Those claims will be evaluated by DOJ pursuant to the rigorous analytical framework set forth in the agencies' Merger Guidelines[1] and decades of federal court decisions interpreting Section 7 of the Clayton Act. Under that framework, there can be no doubt that the effect of the proposed transaction "may be *substantially to lessen competition*, or to tend to create a monopoly" in any relevant line of business.[2]

The parties further suggest that regulators should not be worried about their merger to monopoly because they will submit to price regulation that temporarily locks in the current rates to ensure that satellite DARS customers do not pay more after the merger than they did before. This argument completely disregards the very reason the antitrust laws apply to mergers – to ensure that markets are structured in a way to encourage competition. The very notion that a competitive market structure, which so far has produced a given degree of price competition between the parties, should be replaced by a monopoly provider subject to price regulation is antithetical to the purpose and foundation of the antitrust laws.

Finally, the parties argue that their merger to monopoly should be allowed to proceed because they will achieve efficiencies and cost savings from the transaction. Although in some cases procompetitive efficiencies achieved by a merger that are not achievable through any less anticompetitive arrangement may ameliorate anticompetitive effects that result from a transaction, there exists no set of efficiencies that could offset the very significant competitive

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[1] U.S. Department of Justice/FTC Joint Horizontal Merger Guidelines (April 2, 1992, revised April 8, 1997) ("Merger Guidelines").

[2] 15 U.S.C. § 18 (emphasis added). Note that unlike the standard applicable to review by the Federal Communications Commission, the antitrust laws do not require that the parties demonstrate that the transaction is in the public interest, but rather that it does not substantially lessen competition in any relevant market.

harm that will result from this merger. For these reasons, the DOJ should move to block XM and Sirius from combining to form a monopoly provider of satellite DARS in the United States.

II. Market Definition

Under the Merger Guidelines approach, the first step in an antitrust analysis of the proposed transaction is to define the relevant product and geographic market(s) involved. This includes identification of the existing and potential participants in that market, and an assessment of the proposed transaction's impact on concentration within the relevant market.

A. Market to Provide Satellite DARS

The logical starting place for defining the relevant market is satellite DARS, as provided by both XM and Sirius. The question then is whether the relevant market, as properly defined by the antitrust laws, is broader. The parties argue that the relevant market is much broader, and also includes alternative, not-in-kind audio delivery services such as terrestrial radio, MP3 players, mobile wireless phones and other technologies. Industry commentators, taking this cue, have speculated that such a broad market for audio content delivery services could include "iPods, Internet radio, HD radio,"[3] "wireless music and videos,"[4] and "standard radio . . . and cellphones."[5]

XM and Sirius would like the regulators to ignore the fact that, from its inception in 1997, satellite DARS was considered a unique and separate market from terrestrial radio (AM/FM) – a complement, not a substitute. Consequently, from the beginning the FCC rejected a satellite radio monopoly in favor of competition between two providers. In addition, the parties have failed to explain why today's popular pre-recorded media playback devices (MP3 and iPods) are meaningfully different from the pre-recorded media playback devices in use in 1997 (CD players and cassette recorders). These devices were not then considered substitutes for satellite radio. Also, the parties completely have ignored the fact that Internet radio is generally unavailable in automobiles both today and in the foreseeable future. Internet radio is offered via Internet servers to an entirely different audience than Sirius and XM serve with their constellations of orbiting satellites. Although Sirius and XM offer their programming to subscribers via the Internet, and satellite DARS receivers can be used in the home, this does not make Internet radio a viable substitute for the vast majority of satellite DARS consumers who use the service while they are mobile.

Moreover, the FCC unanimously agreed in its most recent report on satellite competition that satellite DARS is defined "to consist of satellite audio programming provided to persons

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[3] Richard Siklos and Andrew Ross Sorkin, "Satellite Radio in Plan to Merge," New York Times (February 20, 2007).

[4] Chris Nolter, "Satellite Radio Groups Agree Merger," Daily Deal (February 20, 2007).

[5] Charles Babington and Thomas Heath, "Satellite Radio Firms Plan to Merge: XM, Sirius Face Antitrust Hurdles," Washington Post (February 20, 2007).

within the United States for a fee."[6] The FCC's assessment of competition in satellite DARS was based on an examination of the relevant market utilizing the Merger Guidelines. The FCC stated, "[a]lthough this Report is not an analysis of a proposed merger, the *Merger Guidelines* provide useful principles for the analysis of competition in satellite communications markets."[7] It is noteworthy that the FCC specifically excluded from the report satellite services that it deemed are part of broader industries, such as satellite-based MVPD providers (DBS), which are part of the broader video industry, and mobile satellite service (MSS) providers, such as Iridium and Globalstar, which are part of the CMRS industry.[8]

Satellite DARS was considered as a separate market in the report, and its pre-merger (duopoly) concentration is summarized in the following table:

MARKET CONCENTRATION IN SDARS[9]

	2002	2003	2004	2005
XM Market Share (Revenue)	96.1%	87.7%	78.5%	69.7%
Sirius Market Share (Revenue)	3.8%	12.3%	21.5%	30.3%
HHI (Revenue)	9,262	7,843	6,627	5,779
XM (Subscribers)	92.1%	83.9%	73.6%	64.1%
Sirius (Subscribers)	7.9%	16.1%	26.1%	35.9%
HHI (Subscribers)	8,538	7,298	6,138	5,400

While the degree of concentration has decreased over the past four years due to growth in the number of Sirius subscribers, satellite DARS today is a highly concentrated market, both in terms of revenue and subscribers.

Under the Merger Guidelines analysis, the broader market definition urged by the parties fails because most consumers would not substitute other services for satellite DARS in the event

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[6] *Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, First Report, at ¶ 55 (March 26, 2007) ("*Satellite Competition Report*").

[7] *Satellite Competition Report* at ¶ 29.

[8] *Satellite Competition Report* at ¶ 26.

[9] *Satellite Competition Report* at Table 4.

the price of satellite DARS were to increase by a "small but significant and nontransitory" amount – such as 5 to 10 percent.[10] Although consumers may rely on a variety of complementary forms of receiving audio content, it is unlikely that satellite DARS customers would cancel their subscriptions and switch to other sources of audio entertainment if such a price increase were to happen. Nor have the parties appeared to offer support for the proposition that these alternative formats have a disciplining effect on the ability of XM/Sirius to raise prices or diminish the quality of their services.

1. Satellite DARS Pricing Is Unconstrained

XM and Sirius are the primary – if not only – competitive restraint on each other's prices. In fact, Sirius CEO Mel Karmazin is on record suggesting that satellite DARS pricing is *un*disciplined by alternative modes of audio content delivery. On December 6, 2006, in remarks to the Credit Suisse Media and Telecom Week, Karmazin remarked:

> We also believe that there is price elasticity in our subscription price. Too many of you raised your hands when you said you were satisfied. Thank you for that. That's what tells me that maybe if in fact we went from $0.43 a day to something higher than that, that would be an opportunity for us to drive ARPU.[11]

Karmazin elaborated further on January 10, 2007, at Citigroup's 17th Annual Entertainment Media & Telecommunications Conference, when asked whether Sirius would consider higher pricing in 2007:

> Yeah. I mean we're open. One of the things about the company is that people are satisfied with the product, would recommend it to a friend. We have a price point of $12.95. We believe that there is elasticity in our price point. We think we offer great value for under fifty cents a day. Our churn rate reflects the fact that consumers are happy with it. We see what's happening in Canada, where we have a significant lead in satellite radio and we are priced at a higher price point. So, we have no announcement to make on anything regarding any price increases, but we think that that's an option that the company has, and it's a good option for us.[12]

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[10] Merger Guidelines at ¶¶1.11-1.12.

[11] Mel Karmazin, CEO of Sirius Satellite Radio, Keynote Address at the Credit Suisse Media & Telecom Week: Sirius Satellite Radio (December 6, 2006) (transcript available from Voxant FD (FAIR DISCLOSURE WIRE).

[12] Mel Karmazin, CEO of Sirius Satellite Radio, Citigroup 17th Annual Media & Telecommunications Conf. (January 10, 2007) (webcast available at http://investor.sirius.com/medialist.cfm, last visited Mar. 9, 2007).

Notwithstanding the fact that Sirius does not feel constrained by alternative technologies in setting prices, the prices charged by the two satellite DARS providers have been amazingly consistent. Since 2005, both providers have charged $12.95 for their basic services. By contrast, alternative technologies are priced very differently. Most notably, terrestrial radio is free. The economics of other formats, like iPods and cell phones, are very different from satellite DARS. For example, unlike satellite DARS, iPods entail incremental charges for individual content. Although mobile phones can deliver audio content, there is no evidence that the monthly charge for such usage is anywhere near as low as $12.95 per month, or that satellite DARS providers consider those charges in determining how to price their services. In sum, these types of steep price differences among services support the inference that satellite services do not compete in the same product market.[13]

2. Terrestrial Radio Is Not in the Relevant Market

The parties have attempted to make much out of the notion that terrestrial radio is a primary source of competition for satellite DARS. However, this ignores the fundamental characteristics of the two services. Satellite DARS is marketed as a "premium" service, with better audio quality, greater programming variety, and little (or no) commercial interruption. For example, according to Sirius:

> How is your programming different from regular radio?
>
> The biggest difference is 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 interruption.
>
> 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 hundreds of exclusive live interviews and performances you won't hear anywhere else and produce many interesting and engaging live talk shows in our national broadcast studios.[14]

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[13] *See, e.g., F.T.C. v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1163 (9th Cir. 1984) (300 percent price difference between home-recorded and pre-recorded tapes supports government assertion that the two should not be included in same relevant product market).

[14] Sirius Website, FAQs, About Sirius, http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1018209032792, last visited March 9, 2007.

Moreover, the nature of satellite DARS makes it available on a consistent basis to mobile subscribers moving through multiple local broadcast areas (such as truckers) or out of reach of local broadcast areas (such as marine craft). These are the precise reasons that satellite DARS subscribers choose to pay a subscription fee to access service that they prefer to free terrestrial radio.

Although there is evidence that overall demand for terrestrial radio has declined coincident with the increase in satellite DARS subscribers, that does not mean that the two services are in the same relevant antitrust market. This erosion of demand is a one-way street: The relevant issue here is whether satellite DARS subscribers consider terrestrial radio to be reasonably interchangeable with satellite DARS, and *not* whether terrestrial radio listeners consider satellite DARS to be reasonably interchangeable with terrestrial radio. There is no reason to expect that the cross-price elasticities are symmetric. The parties have not pointed to any evidence suggesting that if satellite DARS prices were to increase (or quality of service or level of output decrease), consumers would readily cancel their subscriptions and rely on listening to broadcast radio full time. Indeed, this argument is belied by the fact that the parties have suggested their willingness to agree to price caps as a condition of their deal. If terrestrial radio had a price disciplining effect on satellite DARS, such price regulation would not be necessary.

Instead, satellite DARS and terrestrial radio are complementary services. As Sirius's Karmazin has explained, industry research indicates "that satellite radio subscribers are heavy listeners to radio in general, and spend even more time listening to AM/FM radio than they do satellite programming."[15]

This conclusion is further supported by the regulatory analysis of a closely analogous proposed transaction: the DirectTV/Echostar merger. In that transaction, the FCC and DOJ defined the relevant market as "no broader than the entire MVPD (multichannel video programming distribution) market," declining to include terrestrial broadcast TV services in the relevant market.[16] The FCC left open the possibility that the product market in question "may well be narrower than that," and noted that the administrative law judge hearing the case would need to decide whether the two satellite television companies competed (1) only with one another, (2) with each other and high-capacity cable providers, or (3) with each other and all cable providers.[17] There is no evidence that the parties even attempted to argue that free, terrestrial local broadcast TV should be included in the relevant market.

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[15] Regarding the Digital Future of the United States: The Future of Radio, House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet (March 7, 2007) (statement of Mel Karmazin, CEO of Sirius Satellite Radio).

[16] *See, e.g., In the matter of applications of Echostar Commc'ns Corp. and Hughes Electronics Corp.*, FCC Hearing Designation Order, 17 FCCR 20559, ¶ 33,115 (October 9, 2002) (parenthetical added).

[17] *Id.*

Further, there are certain categories of customers who do not have terrestrial radio available as a substitute for satellite DARS. These customers would be extremely unlikely to switch away from satellite DARS in response to a price increase.[18] In particular, consumers of audio radio service who listen on marine craft far from terrestrial radio stations, who live in rural areas with little terrestrial radio service, or who travel in vehicles that frequently move between the broadcasting areas of terrestrial radio stations, are more susceptible to an anticompetitive price increase. A single, merged satellite DARS provider would be able to engage in price discrimination with respect to these consumers – charging more, say, for a receiver to be used on a boat or in a truck cabin than in a minivan. Under these circumstances, separate relevant product markets might be warranted for those groups of customers subject to price discrimination.[19]

Accordingly, evidence that terrestrial radio services lose overall minutes of demand to satellite DARS is not sufficient to show that satellite DARS subscribers view terrestrial radio services as a close substitute. Terrestrial radio should not, therefore, be included in the relevant product market.

3. Other Sources of Delivering Audio Content Are Not in the Relevant Market

It seems intuitively obvious that other forms of audio entertainment will also prove to be complementary to satellite DARS service. However, this is an empirical question, and little information currently seems to be available to evaluate the extent to which customers would switch to using these technologies if satellite DARS prices increased. For example, while it may be the case that usage of iPods in cars is increasing, a consumers' choice to listen to an iPod or satellite DARS service depends on a complex weighting of the incremental content charges associated with an iPod versus the ongoing subscription fees of satellite DARS. The burden should be on the parties to come forward with empirical evidence demonstrating that such alternatives competitively restrain prices for satellite DARS service.

B. Market to Purchase Content for Satellite DARS

In addition to competing with one another for subscribers, it seems evident that satellite DARS providers compete to buy content for this unique format. The proposed merger may therefore have competitive effects in this upstream market for certain content. For example, recent high-profile deals with Howard Stern and Major League Baseball (MLB) illustrate the significant sums each provider is willing to pay in order to attract content compelling for its paid subscribers.

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[18] *See* Merger Guidelines at ¶¶1.1-1.2.

[19] *Id.* at ¶¶1.0-1.2.

Although satellite DARS providers generally compete with many other outlets to acquire content, satellite DARS appears to be a unique format for the delivery of audio content. In that case, satellite DARS providers may be a unique group of buyers (or among a relatively small group of buyers) for certain types of content. Thus, DOJ should consider whether the proposed transaction will substantially lessen competition in a market for the purchase of content.

III. The Proposed Transaction Will Substantially Harm Competition

In the market for satellite DARS, the combination of the only two providers of service will "substantially . . . lessen competition," as prohibited by the Clayton Act, resulting in higher prices or lower quality of service or level of output.[20] The proposed merger will reduce the number of competitors in the relevant market from two to one, producing a monopolist with a 100 percent share. In such cases, the detriment to competition is obvious, as the only effective constraint on either seller's anticompetitive behavior is removed. Such transactions are almost never permitted because of the combined firm's obvious ability to harm competition.[21]

The parties have suggested several theories as to why their merger to monopoly will not result in harm to competition. First, they suggest that alternative forms of delivering audio content will constrain their ability to act in an anticompetitive way. For the reasons discussed above with respect to market definition, those alternative technologies are not an effective constraint on the two satellite DARS providers today, and they certainly will not be an effective constraint for a future monopolist satellite DARS provider.

Second, it has been suggested that the FCC could allocate additional spectrum to permit entry by a new satellite DARS provider.[22] However, such potential, even if possible, would not be sufficient to ameliorate the very certain anticompetitive effects of the proposed transaction. The Merger Guidelines require that, for such potential entry to be considered, it must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of the" proposed transaction.[23] With respect to timeliness, DOJ will generally consider only entry "that can be achieved within two years from initial planning to significant market

[20] 15 U.S.C. § 18.

[21] *See, e.g.,* Merger Guidelines at ¶2.22 (noting that "[w]here the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their pre-merger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales"); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001) (in the course of issuing an injunction against a proposed merger, court notes that "[a]s far as we can determine, no court has ever approved a merger to duopoly under similar circumstances"); *FTC v. Staples*, 970 F.Supp. 1066, 1081 (D.D.C. 1997) (enjoining merger that would have produced single office superstore in 15 localities and only two superstores in 27 others).

[22] *See, e.g.,* Steve Rosenbush, "New Conditions May Ease XM-Sirius Merger," Business Week, (February 28, 2007).

[23] Merger Guidelines at ¶3.0.

impact."[24] This is extremely unlikely in the case of satellite DARS, as evidenced by the fact that it reportedly took XM and Sirius nearly four years from the grant of spectrum by the FCC to commercial availability, including the technically difficult step of launching broadcast satellites.[25]

Other entry barriers are extremely high, including capital costs, programming acquisition costs, and subscriber acquisition costs. For example, it is reported that a new satellite could cost more than $300 million.[26] Therefore, the threat of such entry is not likely to constrain short-term price increases by the merged firm.[27]

IV. Claimed Efficiencies Are Inadequate and Not Merger-Specific

The proposed transaction will not create pro-competitive efficiencies that are likely to offset the severe competitive harm that is certain to result. The merging parties have been touting certain cost saving and consumer benefits in an attempt to secure regulatory approval of the deal, such as: a "much stronger programming lineup," a lower cost structure based on the elimination of overlapping facilities and personnel, and accelerated "development and commercial introduction of radios allowing consumers access to a full range of programming offered by XM and SIRIUS today."[28]

It is true that, in transactions that may present some degree of competitive harm, the agencies will consider potential efficiencies to determine whether, on balance, the transaction can be considered procompetitive.[29] However, even the greatest efficiencies are rarely (if ever) enough to justify a merger that threatens serious competitive harm. According to the Merger Guidelines, "[e]fficiencies almost never justify a merger to monopoly or near-monopoly."[30]

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[24] Merger Guidelines at ¶3.2.

[25] Charles Babington and Thomas Heath, "Satellite Radio Firms Plan to Merge; XM, Sirius Face Antitrust Hurdles," Washington Post, February 20, 2007.

[26] Forbes.com, "XM Could Launch XM-4 A Year Early" (June 9, 2005).

[27] As a last-ditch strategy, the merger parties could assert the "failing firm" doctrine to argue that the merger is not likely to lead to anticompetitive unilateral effects because one or both parties were doing so poorly that they would exit the market except for the proposed merger. Merger Guidelines at ¶¶ 5.0-5.2. However, given public statements from Sirius CEO Mel Karmazin that he is "optimistic" about the company's future whether or not the merger takes place, this argument would be difficult to make. *See* Maxwell Murphy, "Karmazin Talks Sirius-XM Pact on Stern Show," Dow Jones News Service (February 26, 2007).

[28] Sarah McBride, Dennis K. Berman and Amy Schatz, "Sirius and XM Agree to Merge, Despite Hurdles," Wall Street Journal (February 20, 2007); Charles Babington and Thomas Heath, "Satellite Radio Firms To Merge; XM, Sirius Face Antitrust Hurdles," Washington Post (February 20, 2007); Sirius and XM, Analyst Presentation (regarding proposed merger) (February 20, 2007).

[29] Merger Guidelines at ¶4.0.

[30] *Id.*

Accordingly, as a merger to monopoly among satellite DARS providers, there is no set of efficiencies that will make this transaction overall procompetitive.

Moreover, the parties' claimed efficiencies are not of the type to be given much, if any, weight. The agencies should only consider efficiencies that are "merger-specific," meaning they are "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."[31] For example, the parties claim that the merger will allow them to develop equipment that is compatible with both parties' formats is not merger-specific; there is nothing preventing them from undertaking such a joint project today except for the fact that they compete to retain customers on the basis of sunk costs in equipment. In addition, some of the parties' claimed efficiencies – such as "enhancing cash flow" – may inure to the benefit of shareholders but are not the type of consumer-enhancing benefits that are credited under the Merger Guidelines.

V. There Is No Adequate Remedy

Finally, there is no possible remedy – short of blocking the transaction – that will restore the resulting harm to competition. Some industry analysts have already begun to speculate with respect to potential remedies, including price caps or other price regulation, or requiring the combined firm to offer wholesale satellite DARS service to resellers.[32] However, as a matter of policy, DOJ disfavors "conduct" remedies, such as price regulation, that require ongoing oversight and regulatory involvement.[33] Instead, "[s]tructural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market."[34] The classic example of a structural remedy is to require the merging parties to divest an ongoing business entity capable of replacing competition lost in the merger.[35] Where this is impossible, the DOJ may consider the divestiture of a smaller package of assets, but in such cases it "must be persuaded that these assets will create a viable entity that will restore competition."[36]

In this case, there is no conceivable partial divestiture or other structural remedy that will restore competition in the market for satellite DARS. Both XM and Sirius provide service nationwide and this aspect of their service is critical to the nature of the product they sell, as well

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[31] *Id.*

[32] Steve Rosenbush, "New Conditions May Ease XM-Sirius Merger," BusinessWeek.com (February 28, 2007); David Lieberman, "XM, Sirius Quit Head-to-Head Competition," USA Today (February 20, 2007).

[33] *See* DOJ Antitrust Division Policy Guide to Merger Remedies, at 20 (Oct. 2004) (hereinafter "DOJ Remedies Policy Guide") ("[T]he use of conduct remedies standing alone to resolve a merger's competitive concerns is rare . . . .").

[34] DOJ Remedies Policy Guide at 7.

[35] DOJ Remedies Policy Guide at 9-13.

[36] DOJ Remedies Policy Guide at 13.

as their leverage in purchasing content. Accordingly, divestiture limited to certain geographic areas would not be sufficient. Further, requiring the merged firm to sell wholesale service is not an effective remedy for the loss of a facilities-based independent provider.

The only "remedy" suggested by the parties for their anticompetitive merger is that they would agree to maintain today's price levels for a certain period of time.[37] However, such conduct based remedies "generally are not favored in merger cases because they tend to entangle the Division and the courts in the operation of a market on an ongoing basis and impose direct, frequently substantial, costs upon the government and public that structural remedies can avoid."[38] Moreover, to the extent that satellite DARS prices might fall below $12.95 per month in the absence of the merger, such regulation would be unequivocally welfare-reducing. For these reasons, price regulation is disfavored.[39]

VI. Conclusion

The proposed merger between XM and Sirius will eliminate the only effective competition among the two providers of satellite DARS and is clearly anticompetitive. The growth of satellite DARS over the past five years, and the pricing of those services, illustrates that the parties' offerings are not price constrained by other forms of audio content delivery. Instead, the only restraint on the ability of either firm to charge supra-competitive prices, or offer less-than-competitive quality of service or output, is the very existence of the other firm as its only competitor.

The proposed merger would replace this duopoly market structure, set up specifically by the FCC to ensure at least some level of price and service competition, with a monopolist that is unrestrained in its ability to harm competition. There simply is no "fix" that will restore the competitive structure of this marketplace.

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[37] *See, e.g.,* Mel Karmazin, Testimony Before the House Judiciary Committee's Antitrust Task Force Regarding "Competition and the Future of Digital Music" (February 28, 2007).

[38] DOJ Remedies Policy Guide at 18.

[39] *See*, *e.g.*, DOJ Remedies Policy Guide at 8.