Is Satellite Radio a Luxury? --

And the Answer's Relevance to the Proposed XM/Sirius Merger

Some have suggested that since satellite radio is a "luxury,"[1] federal antitrust and communications officials should adopt a "hands-off" attitude toward the proposed XM/Sirius merger.[2] This would be a mistake.

The predicate is false. A large portion of satellite radio consumers have incomes that are relatively modest,[3] and for many of them the service is more essential than luxury. Consumers value satellite radio's commercial-free nature, its large number of channels, and its nationwide availability.[4] Furthermore, satellite radio consumers come from a broad variety of ethnic categories and social strata. The majority of them reside in small cities, towns, or rural areas.[5]

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[1] The meaning of "luxury" in this context is different from the economist's distinction among luxury goods, normal goods, and inferior goods. The meaning here is that consumers who purchase satellite radio services have high incomes and the service is not really essential.

[2] See, for example, comments of Americans for Tax Reform in MB Docket No, 07-57, at p. 2 ("The satellite radio business is a subscription service consumers choose to purchase, but are in no way forced to."); and Comments of Citizen Outreach Project in MB Docket No. 07-57, at p. 1 ("If consumers decide post-merger that a single satellite radio platform is not operating in the public interest, they will simply look elsewhere for audio entertainment. Satellite radio is not a public utility; rather it is a luxury service that consumers choose to purchase.").

[3] A recent survey conducted by Knowledge Networks found that 21 percent of satellite radio subscribers who indicated their household incomes earn less than $50,000 per year, and 44 percent earn less than $75,000 per year. See Knowledge Networks Home Technology Monitor Ownership Survey, Spring 2007.

[4] See Press Release, Wilson Research Strategies, Survey of Satellite Radio Subscribers Executive Summary 1 (July 9, 2007), available at http://www.w-r-s.com>.

[5] *Ibid.*

One of the most loyal group, and intense users, are over-the-road truck drivers. Indeed, both XM and Sirius devote entire channels to talk radio targeted to truckers.[6]

Obviously, whether something is a luxury or is essential depends on the individual consumer. To most, perhaps, loss of satellite radio service would not affect their lives significantly. But for others, loss of satellite radio, or even paying more for it,[7] would be a matter of serious concern. For example, nearly half of satellite radio subscribers have a daily commute of over one-half hour, and nearly a quarter have a commute of longer than an hour.[8] And as recently revealed in the FCC's record, Americans take an estimated 44 million trips each week on major highways that traverse areas where there are few, if any, local radio signals.[9] Moreover, approximately 2.3 million U.S. residents are located in areas served by five or fewer local radio signals, and an additional 45 million are located in areas served by only six to 15 such signals.[10] Certainly, satellite radio is a highly valuable service to these consumers, for whom the ability to choose between satellite radio services is beneficial.

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[6] See, for example, XM Channel 171 "Open Road," description at http://www.xmradio.com/onxm/channelpage.xmc?ch=open_road, and Sirius Channel 147 "Road Dog Trucking," description at http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Channel&cid=1104779630449.

[7] According to the Wilson Survey, a strong plurality of satellite radio subscribers believe they are currently paying too much for their subscription. Wilson Survey, supra note 4.

[8] *Ibid*.

[9] Petition to Deny of the Consumer Coalition for Competition in Satellite Radio in MB Docket No. 07-57, at Exhibit C, pp. 2-3 (filed July 9, 2007).

[10] *Ibid.*

Even if satellite radio were commonly-perceived as a so-called luxury, that should not affect enforcement of the federal antitrust and communications laws. There are no relevant statutes or other legal precedent to support the notion that luxury goods or services are excluded from legal exposure.[11] There are no decisions by the federal antitrust and communications authorities that articulate a policy of ignoring violations of law or standards of public interest simply because the good or service at issue is a luxury.[12]

Finally, and perhaps most importantly, even if satellite radio could be properly characterized as a luxury and there were a policy of limiting the review of mergers involving luxury goods and services, federal officials should consider the evolution of the market and the fact that decisions over institutional arrangements made today affect the market in the future. Consider the history of the introduction of communications media, including various products and services the merger parties erroneously include in the same relevant antitrust market as satellite radio. Initially (paired-wire) telephones could be afforded only by the wealthy. But now they are ubiquitous – and essential. In the early days, (over-the-air) radios were very expensive, but of course now they are widely available. In fact, the histories of (over-the-air) television, cellular telephone services, personal computers, VCRs, DVDs, DBS, MP3 players, and Internet

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[11] In its enforcement of consumer protection laws, the Federal Trade Commission, on occasion, has chosen to use prosecutorial discretion and not take issue with technically misleading advertising for goods or services purchased by sophisticated (and in some cases high-income) consumers who are able to judge for themselves the veracity of such representations. But the FTC's approach to the possibility of harm to competition from a merger is quite different.

[12] In the most analogous circumstance – the failed merger of EchoStar and DirecTV – no party argued that these two DBS providers should be allowed to merge because the service is arguably a luxury.

access all follow the same pattern: when introduced, the product or service is relatively high in price and is purchased principally by those with high incomes; but quickly prices fall and the product or service is purchased by a much broader set of lower-income users.

The relevance of this pattern of adoption to the proposed XM/Sirius merger is that decisions made by federal officials on the proposed merger will affect not only today's consumers of the service, but those who might use the service in the future. If federal officials approve the merger, they will limit the market's expansion and foreclose many of lower incomes who otherwise might be consumers of the service in the future.

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