This comment examines the proposed merger agreement between Sirius Satellite Radio Inc. (Sirius) and XM Satellite Radio Holdings Inc. (XM). It begins by examining the origin of satellite radio and the current state of Sirius and XM. It proceeds by taking an in-depth look at the Federal Communications Commission's (FCC) public interest analysis and applies that analysis to the current proposed merger. This comment shows that the proposed merger is not anticompetitive, as supported by the Department of Justice in its review of the XM-Sirius merger. Rather, the relevant product market in which satellite radio competes is far broader than satellite radio in the strictest sense. Moreover, this comment will balance the potential public interest harms of the proposed merger against the potential public interest benefits, and indicate how the benefits clearly outweigh the harms. This notion is then further substantiated by analogizing previous FCC orders in relation to the current XM-Sirius proposed merger, and by acknowledging that the shareholders of Sirius and XM have both voted in favor of the proposed merger.1

I. INTRODUCTION

Sirius Satellite Radio Inc. (Sirius) and XM Satellite Radio Holdings Inc. (XM) are currently the only two satellite radio providers in the United States.2 Since early 2002, the companies have been striving to enter and compete with the rest of the radio market.3 In fact, Sirius and XM have each

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invested over $5 billion in an attempt to develop and market their products.\textsuperscript{4} Despite their efforts, however, "Sirius and XM confront high built-in costs and have yet to turn profits."\textsuperscript{5} Instead, the companies face a combined deficit of an estimated $2.4 billion in long-term debt.\textsuperscript{6} This number is devastating and leaves minimal options available for the companies to survive.

In an effort to reduce costs, diversify their programming, and attract additional subscribers,\textsuperscript{7} Sirius and XM proposed a merger agreement to the Federal Communications Commission (FCC) in which "a wholly owned subsidiary of Sirius, Vernon Merger Corporation, will be merged with and into XM, with XM being the surviving entity of this subsidiary merger."\textsuperscript{8} The FCC must determine whether the proposal to transfer control will serve the "public interest, convenience, and necessity",\textsuperscript{9} and if it determines it does, the FCC may grant the merger.

The National Association of Broadcasters (NAB) disputes the proposed merger, contending that "the merger would eliminate competition and create a monopoly."\textsuperscript{10} The NAB argues that satellite radio does not compete against any other form of audio entertainment, and therefore, a merger would not be in the best interest of the public because the merged entity would increase prices and reduce innovation, program quality, and diversity.\textsuperscript{11}

This comment disagrees with the NAB's conclusion and supports the merger for several reasons. First, the merger will not create a monopoly because the relevant product market in which Sirius and XM compete is not limited to the other. Instead, the merged satellite radio entity would compete
with other sources including: terrestrial radio, HD radio, MP3 players, and Internet radio. Calling the merger a "monopoly" is incorrect, especially considering that satellite radio encompasses a mere 3.4% of the entire radio market.12 Second, the public interest benefits of the proposed merger will outweigh any public interest harms. These public interest benefits include: lower prices for monthly subscriptions, more diverse programming, accelerated technology such as interoperable receivers, and operational efficiencies.13

II. THE ORIGIN OF SATELLITE RADIO

The Communications Act of 1934 (the Act),14 which formulated a unified regulatory system for the radio broadcasting industry, is the congressional mandate that grants the FCC the authority to regulate the electromagnetic spectrum.15 The FCC has the power "to establish general guidelines of operations and to grant licenses for use of the spectrum, which encompasses the entire range of electromagnetic frequencies transmitting sound, data, and video."16 On January 18, 1995, the FCC allocated "the 2310-2360 MHz band [of the radio broadcast spectrum] for satellite digital audio radio services (DARS) [or (SDARS)]."17 The FCC decided to set aside this part of the spectrum because allocation of SDARS was in the public interest. It offered benefits such as: CD-quality audio programming, radio availability to previously underserved and unserved markets, diverse

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13 See Consolidated Application, supra note 3, at 10-20.


16 Danoff, supra note 2, at 748; see also FLETCHER, supra note 15 ("The [FCC] has the power to grant or withhold permits for the construction of stations, and to grant, deny, modify, or revoke licenses to operate stations . . . .").

programming, improvement of "U.S. competitiveness in the world marketplace," and posed no "significant adverse impact on existing radio services."  

In 1997, the FCC accepted bids for SDARS licenses and six companies submitted applications to become the first satellite radio providers.\(^{19}\) In the end, however, the FCC decided to grant only two licenses: one to Sirius and the other to XM.\(^{20}\) The FCC granted Sirius and XM these licenses on the condition that the two companies would not merge; if they sought to merge, the FCC would have to waive that condition.\(^{21}\)

In September of 2001, XM began its commercial operations and was the first to step into the satellite radio industry.\(^{22}\) In February of 2002, Sirius began offering its services.\(^{23}\) By December 31, 2006, the companies were operating a total of seven satellites, serving over 13.6 million subscribers, and offering approximately three hundred channels of significantly diverse programming, ranging from: music, sports, news, talk, entertainment, traffic, weather, emergency, and informational data services.\(^{24}\) Furthermore, each company offered its subscribers the ability to access streaming audio content via the Internet and the ability to install their satellite radios in homes, automobiles, boats, aircrafts, and even portable radios.\(^{25}\)

Each company has invested over $5 billion to develop and upgrade their networks, design adequate radio receivers, subsidize costs, develop information technology, market their services, and attract subscribers.\(^{26}\)

\(^{18}\)Id. at 2314.

\(^{19}\)Danoff, supra note 2, at 750; see also Paul, Hastings, Janofsky & Walker LLP, Satellite DARS Auction to Commence, http://library.findlaw.com/1997/Mar/l/129996.html ("On April 1, [1997,] the FCC will commence the auction of two licenses to provide Digital Audio Radio Service . . . via satellite."); Leslie Stimson, Primosphere Wants Back in Satellite Game, Sept. 12, 2007, http://www.rwonline.com/pages/s.0052/t.8415.html (indicating that of the six companies that originally applied for SDARS licenses, only four companies remained at the time of the FCC auction, including: Sirius, XM, Primosphere Limited Partnership, and Digital Satellite Broadcasting Corp.).

\(^{20}\)Consolidated Application, supra note 3, at i. Sirius and XM obtained these licenses through an auction in which they collectively paid more than $170 million to the U.S. Treasury; Sirius paid more than $83 million, and XM paid nearly $90 million. Id. at 2, 4. See also Danoff, supra note 2, at 750-51.


\(^{22}\)Consolidated Application, supra note 3, at 5.

\(^{23}\)Id. at 3.

\(^{24}\)Id. On December 31, 2006, Sirius operated three satellites, served over 6 million subscribers and provided 130 channels to its subscribers. Id. at 2-3. Similarly, XM operated four satellites, served over 7.6 million subscribers, and provided 170 channels to its subscribers. Id. at 5-6.

\(^{25}\)Id. at 3, 5.

\(^{26}\)Consolidated Application, supra note 3, at 3-6.
Despite their efforts, however, Sirius and XM are still facing a combined $2.4 billion in long-term debt. 27

As a result of this deficit, on February 19, 2007, Sirius and XM entered into a merger agreement which indicated that "a wholly owned subsidiary of Sirius, Vernon Merger Corporation, will be merged with and into XM, with XM being the surviving entity of this subsidiary merger." 28 The companies stated that "'[t]he surviving entity [would] be controlled by a new Board of Directors, selected by both Sirius and XM, and its equity ownership will be represented equally by former shareholders of XM and Sirius prior to the merger." 29 On March 20, 2007, Sirius and XM submitted applications to the FCC seeking consent for the proposed merger. 30

The FCC has been actively reviewing the potential merger to determine whether or not it serves the public interest. Sirius and XM are understandably the biggest advocates for the FCC’s approval. The biggest opposition, on the other hand, has been the NAB. This is no surprise since "[t]he NAB is a full-service trade association that protects the interests of major broadcasters" and has opposed satellite radio since its inception into the radio market. 31

III. THE PUBLIC INTEREST ANALYSIS

A. Standard of Review

Pursuant to section 310(d) 32 of the Act, the FCC must determine whether Sirius and XM have demonstrated that the proposed transfer of control to XM of the two SDARS licenses will serve the "public interest, convenience, and necessity." 33 In making this assessment, the FCC must

27 McIntyre & Ogg, supra note 6 (noting that Sirius has approximately $1.1 billion in long-term debt and XM about $1.3 billion); see also Kirkham, supra note 5 (stating that XM has about $1.3 billion in long-term debt and Sirius has about $1.1 billion).
28 Consolidated Application, supra note 3, at 6.
30 Id.
31 Adam Cain, Satellite Radio: An Innovative Technology’s Path Through the FCC and into the Future, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 223, 236 (2005) (“When satellite radio first entered the market ‘the NAB went on an all-out smear campaign to discredit the new technology . . . .’”).
determine whether the merger proposal complies with the relevant provisions of the Act, other applicable statutes, and the FCC's rules and policies.\textsuperscript{34} If there is no violation, the FCC must then determine whether the proposed merger could result in any public interest harms; and, subsequently, it must balance those potential public interest harms against any potential public interest benefits.\textsuperscript{35}

An important part of the FCC's public interest analysis is its competitive analysis.\textsuperscript{36} Although the Antitrust Division of the Department of Justice (DOJ) "reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition," the FCC's analysis goes slightly further by taking into consideration other public interest concerns.\textsuperscript{37} Since the FCC's analysis is broader, it not only focuses on whether the proposed merger will reduce existing competition, but also on its effect on "the market power of dominant firms in the relevant communications markets" and on future competition.\textsuperscript{38}

Lastly, the FCC is not obligated to completely strike down a proposed merger just because it finds public interest harms.\textsuperscript{39} Rather, the FCC maintains the authority to impose and enforce certain conditions on the potentially merged entity to ensure the public interest is not detrimentally affected.\textsuperscript{40} However, the FCC has noted that "it will impose conditions only to remedy harms that arise from the transaction . . . and that are reasonably related to the [FCC's] responsibilities under the Communications Act and related statutes."	extsuperscript{41}

**B. Practical Applications of the Public Interest Analysis**

Since 1997, the FCC has made decisions on over fifty major transactions regarding proposed mergers.\textsuperscript{42} This comment argues that two of these major transactions bear significant relevance to the proposed XM-Sirius merger, and an analysis of the FCC's orders may give insight into how the FCC will decide the proposed XM-Sirius merger. These transactions

\textsuperscript{34}See DirecTV-Liberty Media Merger, 23 F.C.C.R. at 3271; EchoStar-DirecTV Merger, 17 F.C.C.R. at 20,574.

\textsuperscript{35}See EchoStar-DirecTV Merger, 17 F.C.C.R. at 20,574.

\textsuperscript{36}See DirecTV-Liberty Media Merger, 23 F.C.C.R. at 3277-78.

\textsuperscript{37}Id. See infra Part IV.B.1 (discussing the DOJ's review of the proposed XM-Sirius merger).

\textsuperscript{38}DirecTV-Liberty Media Merger, 23 F.C.C.R. at 3278.

\textsuperscript{39}See id.

\textsuperscript{40}Id. at 3279.

\textsuperscript{41}Id.

include the proposed EchoStar-DirecTV merger and the DirecTV-Liberty Media merger.

1. The EchoStar-DirecTV Merger

Of these two major transactions, the FCC only denied the EchoStar-DirecTV merger.\(^{43}\) In that application, EchoStar Communications Corporation (EchoStar) and Hughes Electronics Corporation (Hughes) sought authority to transfer certain FCC licenses and authorizations, including direct broadcast satellite (DBS), to EchoStar (creating what shall be known as New EchoStar).\(^{44}\) As part of the merger, DirecTV Holdings LLC (DirecTV) (a wholly-owned subsidiary of Hughes and also one of two major DBS providers in the United States) would be merged with New EchoStar (the other major DBS provider) and continue operations under the name DirecTV.\(^{45}\) At the time of application, EchoStar and DirecTV provided both video and audio programming and Internet access services.\(^{46}\)

In support of the merger, the applicants claimed several public interest benefits. First, the applicants claimed that by allowing the merger they would be able to eliminate overlapping programming in the DBS spectrum and thus offer more niche programming, including foreign language and educational programming.\(^{47}\) At the time of application, EchoStar and DirecTV had over five hundred identical channels of programming.\(^{48}\) Therefore, they claimed that permitting the merger would essentially "promote the Commission's long-standing policy in favor of efficient and non-duplicative use of the spectrum."\(^{49}\) Second, the applicants asserted that the merger would be procompetitive because New EchoStar would be in a better position to compete with cable operators that offer bundled services.\(^{50}\) Lastly, the applicants claimed that the merger would allow New EchoStar to


\(^{44}\) Id. at 20,561. There was another component to this proposed transaction that was intended to occur prior to the proposed EchoStar-DirecTV merger. Id. at 20,569. The application called for a separation transaction whereby Hughes would separate from General Motors Corporation (GM) by means of a split-off. Id.

\(^{45}\) Id. at 20,561.

\(^{46}\) Id. at 20,564, 20,567-68.

\(^{47}\) EchoStar-DirecTV Merger, 17 F.C.C.R at 20,573, 20,587.

\(^{48}\) Id. at 20,573, 20,587.

\(^{49}\) Id. at 20,573.

\(^{50}\) Id. A common example of bundled services would be the "Comcast Triple Play," which offers subscribers cable, phone, and high-speed Internet services for lower rates than if the subscriber subscribed to each service independently. See Comcast Triple Play, http://www.comcast.com/tripleplay (last visited June 21, 2008).
provide high-speed Internet access service across the country in a more timely and effective manner than if the merger was denied.\(^{51}\)

The FCC determined that approving the application was not in the public interest.\(^{52}\) Although the FCC acknowledged that the aforementioned benefits would improve "the overall current efficiency of use of the DBS spectrum," the proposed merger was still anticompetitive, and therefore, in violation of the FCC's rules and policies because it concentrated 100% of the then-current DBS spectrum into a single company.\(^{53}\)

One of the biggest factors the FCC took into account, specifically in response to an argument by EchoStar and DirecTV that they did not really compete against one another, was the antitrust suit EchoStar had filed against DirecTV.\(^{54}\) The FCC determined that this antitrust suit undercut EchoStar's and DirecTV's argument that their main competitor was cable and not each other.\(^{55}\)

\(^{51}\)EchoStar-DirecTV Merger, 17 F.C.C.R. at 20,574.

\(^{52}\)Id. at 20,562.

\(^{53}\)Id. at 20,586, 20,595, 20,598. As analogous to this 100\% ownership, the FCC referenced its granting of the satellite DARS licenses to XM and Sirius, and said that it "provided for two DARS licenses because it determined that more than one DARS licensee was necessary to ensure competitive advantages, diversity of programming voices, and other benefits of a competitive DARS environment." Id. at 20,598 (quoting Establishment of the Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band, 12 F.C.C.R. 5754, 5786 (1997)).

\(^{54}\)Id. at 20,622. In this antitrust suit, EchoStar alleged that DirecTV: "(1) signed exclusive dealing contracts with electronics retailers, (2) organized a group boycott . . . (3) conspired with HDTV manufacturers to exclude EchoStar from the HDTV market, (4) paid professional sports leagues to refuse to accept EchoStar's bids, and (5) falsely disparaged EchoStar's products." Petition to Deny of National Association of Broadcasters, In re EchoStar Commc'ns Corp., General Motors Corp., Hughes Elecs. Corp., Transferee, and EchoStar Commc'ns Corp., Transferee, at 37, CS Docket No. 01-348 (filed Feb. 4, 2002), available at http://www.fcc.gov/transaction/echostardirecTV/nab_petition020402.pdf. Of significant importance to the FCC's analysis was the fact that EchoStar specifically stated:

The relevant market for this case is not the MVPD Market, but rather a submarket of the MVPD Market known as the High Power DBS Market . . . . EchoStar does not dispute that there is an MVPD Market and that both EchoStar and DIRECTV compete with cable companies in that market. However, the DBS Market is an appropriate submarket of the MVPD market for antitrust purposes.

\(^{55}\)Id. at 38. (quoting Request for Rule 56(f) Continuance to Respond to DIRECTV Defendants' Motion for Summary Judgment and Memorandum of Law in Support Thereof at 7-8, EchoStar Commc'ns Corp. v. DIRECTV Entm't Corp., No. 00-K-212 (D. Colo. Nov. 6, 2000)).
2. The DirecTV-Liberty Media Merger

In the DirecTV-Liberty Media merger, News Corporation (News Corp.), The DirecTV Group Inc. (DirecTV), and Liberty Media Corporation (Liberty Media) sought authority to transfer control of DBS licenses and authorizations from News Corp. to Liberty Media. The parties entered into an agreement whereby Liberty Media would become the largest stockholder of DirecTV, and News Corp. would divest all interests in DirecTV. At the time of application, DirecTV offered satellite television services while Liberty Media was engaged in the video, media, communications, and entertainment industries.

In support of the merger, the applicants claimed two primary public interest benefits. First, the applicants indicated that because News Corp. would divest all interests in DirecTV, the transaction would eliminate this ownership and, therefore, reduce media consolidation—a concern of the FCC. Second, the applicants argued that the transaction would allow Liberty Media, as the majority shareholder of DirecTV, to promote greater innovation and video services to consumers of DirecTV.

Although the FCC agreed that the transaction would decrease media consolidation (which benefits the public), it did not find sufficient evidence on how or why the transaction would lead to greater innovation. Moreover, Liberty Media, DirecTV, and Liberty Cablevision of Puerto Rico, Ltd. (LCPR) would all be controlled by John Malone if the merger was approved. Malone was the chairman of the board of Liberty Global, which owned LCPR, and "four members of Liberty Media's Board of Directors, including Malone, [sat] on Liberty Global's ten person Board of Directors." In Puerto Rico, the only three competitors were DirecTV, LCPR, and EchoStar. Therefore, if the transaction was approved, two of the three competitors would be commonly controlled. Because EchoStar was not a strong enough competitor in Puerto Rico to prevent LCPR and DirecTV from "profitably increasing prices or reducing service quality in LCPR's

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57 Id. at 3274-75.
58 Id. at 3269-70.
59 Id. at 3332.
60 DirecTV-Liberty Media Merger, 23 F.C.C.R. at 3334.
61 Id.
62 See id. at 3271-72.
63 Id.
64 DirecTV-Liberty Media Merger, 23 F.C.C.R. at 3283.
65 Id.
territory," the FCC determined that the proposed transaction could reduce competition in Puerto Rico, which would lead "to higher prices, lower quality service or both."66

Because the decrease in media consolidation was a significant public interest benefit, the FCC decided to approve the merger application.67 Due to the anticompetitive effects of the transaction in Puerto Rico, being that DirecTV and LCPR are in direct competition but commonly owned,68 the FCC imposed a condition on the merger whereby all interests connecting DirecTV in Puerto Rico and LCPR would have to be severed within one year from the date on which the FCC Order was adopted.69

IV. THE PUBLIC INTEREST ANALYSIS
AS APPLIED TO THE PROPOSED XM-SIRIUS MERGER

A. Compliance with the Communications Act
and FCC Rules and Policies

On March 3, 1997, the FCC released its "Rules and Policies for the Digital Audio Radio."70 Section G of this order was specifically delegated to discuss "Rules for Auctioning DARS Licenses," which includes a subsection indicating the FCC's rule on transferring of licenses.71 The FCC states:

We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignments of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby. Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.72

66ld. at 3283-84.
67ld. at 3334.
68DirecTV-Liberty Media Merger, 23 F.C.C.R. at 3286.
69ld. at 3294.
71See generally id. at 5812-24.
72ld. at 5823 (emphasis added).
This rule, however, is not necessarily binding. The FCC maintains the power to "waive specific requirements of the rules on its own motion or upon request" if it is shown that "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by . . . the instant case, and that a grant of the requested waiver would be in the public interest . . . ."\(^73\)

An underlying purpose of the Rules and Policies for the Digital Audio Radio was to "help assure sufficient continuing competition in the provision of satellite DARS service."\(^74\) Therefore, in order for this purpose to be served by waiving the rule and allowing one company to control both licenses, competition in the market in which satellite radio competes must still be prevalent after such a transfer of control. Sirius and XM argue that "the modern market for audio entertainment services in which satellite radio competes for listeners has significantly evolved in the past ten years and is now extremely competitive."\(^75\) This comment supports this proposition.

B. *The Competitive Analysis*

1. The DOJ's Review

As previously indicated, the DOJ's Antitrust Division reviews telecommunications mergers to determine whether they are likely to "substantially lessen competition" in the relevant marketplace.\(^76\) Therefore, the DOJ's Antitrust Division reviewed the proposed XM-Sirius merger to make the above-referenced inquiry and determined that the proposed merger will not likely lessen competition in the marketplace in which satellite radio competes.\(^77\) The DOJ reached this decision because it found: (1) a lack of competition between Sirius and XM in important segments, (2) plenty of competitive alternatives to satellite radio, and (3) a multitude of benefits to consumers that would likely result from the proposed merger.\(^78\) The DOJ's decision is thus a significant contribution to this comment and must be discussed.

First, the DOJ determined that, "[a]lthough the firms in the past competed to attract new subscribers, there has never been significant competition

\(^74\) Establishment of DARS Rules, *supra* note 70, at 5823.
\(^75\) Consolidated Application, *supra* note 3, at 51-52.
\(^78\) *Id.*
between them for customers who have already subscribed to one or the other service" and competition for new subscribers appears to be "substantially more limited in the future than it was in the past." As to existing subscribers, the DOJ found that, since no interoperable radios that enable subscribers to listen to both Sirius and XM currently exist, nor are they likely to exist in the near future, people are not likely to switch between services because of the costs incurred in purchasing the additional equipment. Therefore, if subscribers rarely switch between the two services, there is little competition between such already existing subscribers.

Moreover, as to new subscribers, there tends to be two primary channels in which they receive their satellite radio service: car manufacturers and mass-market retailers. Because Sirius and XM have already "engaged in head-to-head competition for the right to distribute their products and services through each car company," sole-source contracts exist with all major automobile manufacturers through 2012 or beyond, leaving no more room for competition between the two companies in acquiring new subscribers who get their services through the purchase of a new automobile. Lastly, as to mass-market retailers, the DOJ found that "[r]etail channel sales have dropped significantly since 2005," and it could not say with any certainty whether this channel of acquiring satellite radio service would continue to be important in the future.

Second, the DOJ analyzed whether the relevant product market in which satellite radio competes was limited to just satellite radio or if this product market included other services. The DOJ determined that the relevant product market was not limited to satellite radio, but included other services such as Internet radio on mobile devices, which are likely considered by consumers to be "an attractive alternative to satellite radio." Furthermore, the DOJ found that the relevant product market could not be limited to only Sirius and XM because each offers a variety of different and exclusive programming which "reflects an effort to attract consumers with highly differentiated interests and tastes." Therefore, the two really "do not appear to be the closest substitutes for other current or potential customers." For example, Major League Baseball has an exclusive

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79 Id. at 2.
80 Id.
82 Id. at 2-3.
83 Id. at 3.
84 Id.
85 Press Release, supra note 77, at 3-4.
86 Id. at 3.
87 Id.
contract with XM, as does Howard Stern with Sirius; therefore, one interested in baseball would most likely subscribe to XM, while another interested in Howard Stern would most likely subscribe to Sirius.  

Lastly, the DOJ determined that the efficiencies of the proposed merger are likely to combat any concerns regarding an increase in price. The only efficiency released in the DOJ's statement was variable cost savings. The DOJ determined that the merger would enable the new entity to: "consolidate development, . . . eliminate duplicative costs, and realize economies of scale," allowing these savings to the companies to implicate a chain reaction, thereby passing savings to consumers in the form of lower prices. The DOJ stated that "[t]hese efficiencies alone . . . would be sufficient to undermine an inference of competitive harm."  

2. The FCC's Competitive Analysis

a. The Relevant Product Market

The relevant product market is "the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a 'small but significant and non-transitory price increase,' presuming no change in the terms of the sale of other products." A product's relevant market is one that, if the product were to increase in price, buyers would switch to the other product or a product that is "reasonably interchangeable in pricing, use and qualit[y] . . . ." Therefore, it must be determined what products or services are "reasonably interchangeable by consumers for the same purposes" as satellite radio. The definition could provide for a relevant product market as narrow as just satellite radio services, or as broad as the entire audio/video entertainment industry.

To make this determination, it is important to look at the circumstances surrounding satellite radio, including where it is most

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88 Id.
89 Press Release, supra note 77, at 4.
90 Id.
91 Id.
92 Id.
94 Constance Robinson, Mergers and Acquisitions, 1602 PLI/CORP 185, 194 (2007).
frequently listened to and its cost in relation to other services. "Satellite radio remains largely an in-car medium. Approximately three-fourth (73%) receive the service in a vehicle, while more than four in ten (44%) listen at home.96 Almost one-fourth (23%) tune in during at-work hours, while 12% listen on a portable device."97 Therefore, satellite radio appears to be a versatile listening service. Since its primary uses are in the vehicle and at home, to be considered a competitor that is reasonably interchangeable, another service must also offer at least these two options. Moreover, the fact that satellite radio is now portable should be an indication that it has intentionally expanded its market to reach services not necessarily providing radio (i.e., iPods and other MP3 players). Furthermore, it should be noted that satellite radio has also provided the opportunity for its listeners to access satellite radio via the Internet, thereby making Internet radio within its competitive market.98

Satellite radio requires subscribers to pay two types of costs: an activation cost and monthly subscription costs. Although some may argue that satellite radio requires costs incurred with buying the receiver and subsequently installing it, that is not necessarily true. Just like terrestrial radio, which is preinstalled in most cars, satellite radio is now offered through all major automobile manufacturers.99 Therefore, consumers only have to pay activation and subscription costs, which are both relatively low and probably not an issue to most subscribers. The activation cost is a mere one-time fee of $15.00,100 and monthly subscription costs are currently $12.95.101 Most likely, these costs are not an issue for subscribers because they are essentially a quid pro quo: subscribers pay fees and satellite radio providers provide commercial free music.102

97Ibid.
102See Ray Torres, Should I Buy a Satellite Radio?, http://ezinearticles.com/?Should-I-Buy-a-Satellite-Radio?&id=1048773 (last visited June 21, 2008) ("Among the great advantages of using a satellite radio is the fact that the programming [sic] is actually commercial free. This is because signal provider's income comes from listeners, who pay a fee to access the station's signal, and not from advertisers as in the case of 'traditional' radio.").
If a consumer is installing a satellite radio in an older car, then he or she will have to pay for a receiver and installation costs. Receiver costs can range anywhere from $19.99 to $329.99, depending on the purchaser's desired features. The Sirius Stiletto 2, being on the more expensive side ($329.99), provides the most features. Not only is it completely portable (home, automobile, and independently roaming), but it offers Wi-Fi connectivity, a multicolor liquid crystal display screen, MP3 playback ability, and records up to one hundred hours of satellite radio music. However, the Sirius Stiletto 2 is not necessarily expensive because of these options. Rather, it is comparable to the 8GB iPod touch, which is also completely portable, allows for Wi-Fi connectivity, features a multicolor widescreen display, offers MP3 playback ability, and maintains around 109 hours of music, all at a cost of $299.99.

Therefore, it appears that the relevant product market includes music services that provide for multiple accessibility options, including, but not limited to: automobile use, at-home use, at-work use, portable use, and those devises that provide Internet accessibility from multiple locations. Moreover, based on the current market providing for the above-referenced quid pro quo, and similar pricing in equipment, it appears that price is not a factor that necessarily needs to be considered. For the purposes of this article, this product market will be referred to as "mobile audio entertainment services."

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105 See id.

106 According to BestBuy.com, the device holds 1,750 songs. See BestBuy.com, Apple-iPod Touch 8GB MP3 Player, http://www.bestbuy.com/site/ols.js[p?id=8500437&type=product&id=1186004962130 (last visited June 21, 2008). If the average song is 224.85 seconds long, or 3.75 minutes, then simple math indicates that 1,750 songs, at 3.75 minutes per song, provides approximately 109 hours of music (1,750 songs multiplied by 3.75 minutes per song equals 6562.5; divide the total by 60, to indicate hours, and you get 109.375). See Shourin Sen, The Denial of a General Performance Right in Sound Recordings: A Policy that Facilitates our Democratic Civil Society?, 21 HARV. J.L. & TECH. 233, 260 (2007) (indicating that amongst "the most popular songs on Billboard Magazine's year end charts, songs composed by their performers average 245.1 seconds in length while those written by a second party average 204.6 seconds."). Therefore insinuating an average song length of 224.85, the median between the two. Id.

107 See BestBuy.com, supra note 105.
b. **Market Participants**

In addition to defining the relevant product market, it is essential to define the market participants. Market participants include firms that currently participate in the relevant market and "uncommitted entrants"—those likely to enter the relevant market within one year. In this respect, the market participants in direct competition with satellite radio include: terrestrial radio, HD radio, MP3 players, and Internet radio/mobile phones.

1. **Terrestrial Radio**

First, satellite radio has to compete with "the most dominant form of audio entertainment," namely terrestrial radio. Of the 232 million radio listeners in the United States, satellite radio only accounts for roughly 14 million listeners. This number is just 3.4% of the terrestrial radio's market, according to a study conducted by Arbitron. This data seems to suggest that competition is not only prevalent, but extremely favorable to terrestrial radio. Therefore, even if XM and Sirius were to merge, terrestrial radio would still be the dominant figure in the mobile audio entertainment market.

Furthermore, it is evident from the actions of major terrestrial radio broadcasters that terrestrial radio views itself as a competitive force against satellite radio. "Major radio companies from Clear Channel Communications to Viacom's Infinity Broadcasting to Entercom Communications have banded together to create 30-second spots featuring such stars as Avril Lavigne and Ludacris talking up local radio . . . . The companies are devoting an estimated $28 million of their airtime to the promotion." If terrestrial radio was not competing for the same listeners as satellite radio,

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109 Consolidated Application, supra note 3, at 24.
112 This dominance can be reflected by "its ongoing economic clout; for example, in 2005, the largest ten radio operators posted revenue of $9 billion and billions in positive cash flow." Consolidated Application, *supra* note 3, at 26.
then why would terrestrial radio spend $28 million of their airtime on such campaigns? Although the majority of these campaign advertisements do not mention satellite radio, some do: "Entercom, which owns 105 stations around the country, organized a spot campaign earlier this year that singled out satellite radio -- in particular, reception problems and cost -- for criticism."\(^{114}\) This campaign's effort to keep consumers listening to terrestrial radio and away from satellite radio demonstrates that terrestrial radio views itself in competition with satellite radio.

In opposition to the argument that satellite radio competes with terrestrial radio, the NAB argues that since "'satellite radio subscribers are heavy listeners to radio in general,' . . . terrestrial radio and satellite DARS are complementary rather than substitutable services."\(^{115}\) Just because a person has the ability to utilize both radio services, however, does not mean that they are in competition with one another. Competition is defined as "[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties."\(^{116}\) In the radio industry, these third parties are those that listen to the radio. Why? Because "a radio station typically generates its revenue by selling airtime to advertisers"\(^{117}\) in the form of commercials, and since advertisers want their commercials to be heard by listeners, "there would be few, if any, advertisers willing to pay a radio station for access to its airwaves" if listeners were not tuning into that radio station.\(^{118}\) Therefore, since satellite radio and terrestrial radio are both trying to obtain business from the same third parties—people who listen to the radio—it is evident that they must be in competition with one another.

2. HD Radio

HD radio was originally developed to improve terrestrial radio broadcasting.\(^{119}\) It is highly attractive because it offers traditional broadcasts in CD-like quality and has the ability to receive wireless data services into its

\(^{114}\)Id.


\(^{118}\)Id.

signal to provide the user with extra information, such as song titles, news, and traffic warnings.\textsuperscript{120} HD radio is specifically in the mobile audio entertainment service product market because it is offered as a service in automobiles, in the home, and has portable capabilities similar to satellite radio.\textsuperscript{121} Lastly, HD radio is not just a fad; it is consistently growing within the radio market. "[B]y some estimates, almost one-third of one million Americans already listen to HD Radio on a weekly basis, and this number is expected to increase to approximately twelve million by 2010."\textsuperscript{122} In opposition to the argument that satellite radio has to compete with HD radio, the NAB argues that "even with digital capabilities, local radio stations will not be able to offer the hundreds of channels satellite radio can, nor will they offer the nationwide scope of satellite radio."\textsuperscript{123} What the NAB fails to realize, however, is that HD radio is offering superior sound quality over what satellite radio and traditional terrestrial radio offer. This fact alone proves that HD radio competes with satellite radio because there appears to be a lot of people (i.e., one-third of one million Americans already listen to HD radio)\textsuperscript{124} that would prefer quality over quantity. Moreover, some people may not want the broad range of content offered by satellite radio, but would prefer the HD radio appeal of local news and programming.\textsuperscript{125}

3. MP3 Players

MP3 players, specifically iPods, are in fierce competition with satellite radio. Such devices offer CD-quality music, unlimited access to the user's songs of choice, versatility, and portability.\textsuperscript{126} In regards to versatility, portable MP3 players "can be connected to online music subscription services,"\textsuperscript{127} home stereo and theater systems, alarm clocks, computers, and essentially anything else that can play music. In fact, just like satellite radio, which is predominantly listened to in the car,\textsuperscript{128} MP3 players can also be

\begin{footnotesize}
\begin{enumerate}
\item Id. at 207-08.
\item Consolidated Application, supra note 3, at 27.
\item Petition to Deny, supra note 11, at 16.
\item Consolidated Application, supra note 3, at 27.
\item Franklin, supra note 119, at 211.
\item Consolidated Application, supra note 3, at 31.
\item Id.
\item See Jacobs, supra note 96.
\end{enumerate}
\end{footnotesize}
connected to a person's car stereo. In 2007, more than 70% of U.S. automobiles were estimated to offer iPod integration, "making it easy for [iPod] users to enjoy and control their iPod's high-quality sound through their car's stereo system."\textsuperscript{129} Therefore, MP3 players essentially offer the best of both worlds: they offer superior sound quality, like HD radio, and are not subject to the limitations of local broadcasting (allowing MP3 players to be listened to anywhere the listener desires, just like satellite radio). For this reason, MP3 players are highly attractive and serve as competition to satellite radio.\textsuperscript{130}

In opposition to the argument that satellite radio competes with MP3 players, the NAB argues that such devices "do not offer the kind of variety of pre-programmed or live material as satellite DARs" and provide a different experience than radio.\textsuperscript{131} This argument is not necessarily true. The NAB, in its opposition to Internet radio, cites to testimony by David Balto from a Senate Judiciary Hearing,\textsuperscript{132} where he stated, "Unlike Internet based radio, satellite radio can travel with [you] in the car, or on a hike, or on a beach." MP3 players, however, are the source that allows downloaded media from Internet radio, and the Internet in general, to achieve the same results. After one downloads media, he or she can then put it on his or her MP3 player and use that device in his or her car, on a hike, or on the beach. Therefore, satellite radio and MP3 players really do offer similar services and essentially compete. Moreover, although not necessarily live material, MP3 players do offer preprogrammed material since users must program their device with the tracks they want. For some, this may be more desirable than satellite radio since the listener gets to be his or her own disc jockey and choose whatever songs he or she likes best.


\textsuperscript{130}The desirability of MP3 players is shown by the fact that "341 million MP3 players are projected to ... [be] sold in the United States by" 2009. Consolidated Application, supra note 3, at 33.

\textsuperscript{131}Petition to Deny, supra note 11, at 16.

\textsuperscript{132}The Hearing was before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights. See id. at 13 n.38. David A. Balto "is an antitrust lawyer in Washington, D.C. and has practiced antitrust law for over 20 years in the Antitrust Division of the Department of Justice, the Federal Trade Commission and private practice." FTC.gov, David Balto: Bio, http://www.ftc.gov/os/sectiontwohearings/docs/070213baltobio.pdf (last visited June 21, 2008).

\textsuperscript{133}Petition to Deny, supra note 11, at 17 n.54.
4. Internet Radio/Mobile Phones

Internet radio is preferred by many because it is typically accessed through a computer connected to the Internet.\textsuperscript{134} This alternative is attractive because the computer allows the listener to decide what type of radio quality he or she wants by updating the sound card, speakers, etc., and allows the listener to record the media that is streamed.\textsuperscript{135} Another benefit of Internet radio, which makes it similar to satellite radio, is that Internet radio also offers a "variety of niche programming . . . including such varied offerings as breakbeat, old-time radio, soundtracks, and Middle Eastern."\textsuperscript{136} Furthermore, "[s]everal Internet radio services, including Yahoo! LAUNCHCast and Pandora, allow users to create their own Internet radio stations," enabling the listener to act as his or her own disc jockey.\textsuperscript{137}

Although Internet radio is not as mobile as other forms of mobile audio entertainment services, since it cannot yet be directly accessed in the car or via a portable device, it is still in direct competition with satellite radio. XM and Sirius both offer Internet-only subscriptions to their services that are commercial free and of higher sound quality than basic Internet radio.\textsuperscript{138} Satellite radio's monthly fee of $2.99 is equal to, if not less than, what other Internet radio providers charge for access to their services.\textsuperscript{139}

While Internet radio is currently not portable like the iPod or Sirius Stiletto 2, the DOJ indicated that Internet radio on mobile phones is likely forthcoming.\textsuperscript{140} This would make mobile phones a potential uncommitted entrant in the mobile audio entertainment market. In fact, in a 2007 study conducted by Arbitron, mobile phones were listed as "the next frontier for audio entertainment and information."\textsuperscript{141} According to this study, nearly

\textsuperscript{134}Consolidated Application, supra note 3, at 28.
\textsuperscript{135}Franklin, supra note 119, at 212.
\textsuperscript{136}Id.
\textsuperscript{137}Consolidated Application, supra note 3, at 29.
\textsuperscript{139}See supra note 138. See also Digitally Imported Radio, http://www.di.fm/pro/signup/ (last visited June 21, 2008) (indicating that Digitally Imported offers commercial free, higher sound quality Internet radio for $4.95 to $6.95 per month); LAUNCHcast Plus Radio, http://music.yahoo.com/launchcast/subscription/default.asp (last visited June 21, 2008) (indicating that Yahoo charges $2.99 per month for Internet radio access that is commercial free); Live365—VIP Membership, https://store.live365.com/orders/orderform-listen.live (last visited June 21, 2008) (indicating that Live365 offers commercial free, higher sound quality Internet radio for $4.95 to $7.95 per month).
\textsuperscript{140}See Press Release, supra note 77, at 4.
\textsuperscript{141}ARBITRON INTERNET BROADCAST SERVICES, THE INFINITE DIAL 2007: RADIO'S
74% of those interviewed owned a cell phone and of that 74%, 31% indicated that they were "very/somewhat" interested in a cell phone with radio access.\textsuperscript{142}

C. Discussion of the Potential Public Interest Harms

The NAB's petition enumerated various public interest harms, including: (1) increases in the price of satellite radio service; (2) a reduction in innovation, program quality, and diversity; and (3) detriment to local radio stations and their listeners.\textsuperscript{143} Since this comment supports the proposed XM-Sirius merger, this section will outline the purported public interest harms as perceived by the NAB, but then balance those harms by introducing the public interest benefits in the next section.

First, the NAB argues that if XM and Sirius are permitted to merge, the merged entity would increase prices or maintain prices at an anti-competitive level.\textsuperscript{144} The NAB supports its argument by the fact that, in the past, the number of subscribers did not diminish when prices increased.\textsuperscript{145} In 2005, "[d]espite the price increase[s], the number of XM subscribers jumped by 84 percent . . . and subscriber growth in the last three quarters of 2005 (i.e., following the price increase) was significantly higher than during the same period of the prior year."\textsuperscript{146}

Second, the NAB argues that the merger would likely reduce innovation, program quality, and diversity.\textsuperscript{147} Why? Because, the NAB argues that "competition between XM and Sirius has been fierce, with the companies spending millions of dollars to acquire exclusive rights to unique program content, such as national sports programming, niche programming, . . . and exclusive music artists and series."\textsuperscript{148} Therefore, it reasons that if the merger was permitted, such fierce competition would be reduced, and the desire to seek out "unique and innovative content" would be eliminated.\textsuperscript{149} Furthermore, since Sirius and XM already have "exclusive deals for out-of-market sports packages and national news and entertainment sources that are

\textsuperscript{142}Id. at 19.
\textsuperscript{143}See Petition to Deny, supra note 11, at 27-33.
\textsuperscript{144}Id. at 27.
\textsuperscript{145}Id. at 28.
\textsuperscript{146}Id.
\textsuperscript{147}Petition to Deny, supra note 11, at 27.
\textsuperscript{148}Id. at 30.
\textsuperscript{149}Id.
unavailable to terrestrial broadcasters[,] . . . the merged entity would have even greater market power," and could force such providers to deal only with satellite radio, leading to less diverse programming for the consumers.150

Lastly, the NAB argues that the merger could result in a loss of advertising revenue to local radio stations, which would consequently lead to a reduction in local programming, harming local listeners.151 Sirius and XM have "pledged to unbundle their program offerings to offer programs on an à la carte basis, and to develop tiered service offerings to offer a lower-cost point of entry."152 However, since these lower-cost service tiers are likely to be partially financed by advertising,153 the merged entity could "use revenues from its higher-priced premium service offerings to cross-subsidize its national advertising rates . . . which would allow [it] to drive down advertising rates" to the detriment of local radio stations.154 In response to these lower rates, local radio stations would be forced to reduce their local programming, which would lead to decreased local radio content and cause broadcasters and local listeners to suffer.155

D. Balancing Potential Public Interest Harms and Benefits

This comment concludes that the proposed merger transaction does not violate the Act, other applicable statutes, or the FCC's rules and policies. Therefore, this section will finalize the analysis by weighing the potential public interest harms against the potential public interest benefits. First, the purported public interest harms will be discredited by weighing them against the likely public interest benefits; second, an analogy will be drawn between the proposed XM-Sirius merger and other previously proposed mergers, as noted in Part III.B; and finally, the shareholders' opinion of the proposed merger will be discussed.

1. The Public Interest Benefits Outweigh Potential Harms

First, it is likely that the merger will lead to lower prices and greater program choices. Although the public interest harms analysis utilizes a 2005 study to demonstrate that XM and Sirius have raised prices in the past while increasing subscriptions, that study does not necessarily indicate that after

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150 Id. at 31-32.
151 Petition to Deny, supra note 11, at 33.
152 Id. at 32.
153 Id. at 33.
154 Id.
155 Petition to Deny, supra note 11, at 33.
the merger the same result will happen.\textsuperscript{156} In fact, in 2005, when XM decided to raise its prices from $9.99 per month to $12.95 per month, the only reason it did so was because it wanted to match Sirius's price.\textsuperscript{157} Additionally, XM decided to include a channel that was previously costing subscribers $1.99 extra per month to the basic service package.\textsuperscript{158} Therefore, if anything, such a price increase was actually the result of direct satellite radio competition,\textsuperscript{159} not an anticompetitive monopoly, and bears no reflection on how the merged entity will act.

In addition, the argument that Sirius and XM will be able to drive down advertising rates by cross-subsidizing does not actually prove to be a public interest benefit because the merged entity will have the ability to generate revenue from other sources, and therefore can charge subscribers less per month. Furthermore, other indications that the merger will generate lower prices are that, while the entities are separate companies, "[c]onsumers have only a limited ability to tailor their service, such as the ability to request that certain channels be blocked,"\textsuperscript{160} and must pay the combined payment of $25.90 per month to have service from both Sirius and XM.\textsuperscript{161} Afterwards, however, consumers will have the option of selecting from different packages of channels for less than the previous standard of $12.95 per month.\textsuperscript{162} If consumers want both services, they "will be able to do so on a single device for significantly less than the current price of $25.90" per month.\textsuperscript{163} Lastly, the combined company will likely provide customers a credit if they choose to have certain channels blocked out—an option which is not currently available.\textsuperscript{164}

In regards to offering more programming, Sirius alone currently offers it subscribers 130 channels,\textsuperscript{165} while XM offers 170 channels.\textsuperscript{166} If the two companies are permitted to merge, subscribers would then have the option of choosing from around three hundred different channels (prior to any overlap

\textsuperscript{156}Id. at 28.
\textsuperscript{158}Id.
\textsuperscript{159}See infra Part IV.D.2 indicates that XM and Sirius are not actually in competition with one another. It is important to note that such a reference is in regards to current competition, not competition which took place in the early years of satellite radio.
\textsuperscript{160}Consolidated Application, supra note 3, at 10.
\textsuperscript{161}See id. at 11.
\textsuperscript{162}Id.
\textsuperscript{163}Id. at 12.
\textsuperscript{164}Consolidated Application, supra note 3, at 12.
\textsuperscript{165}Id. at 5.
\textsuperscript{166}Id. at 3.
consolidation). Moreover, since Sirius and XM have exclusive programming, customers of both companies will be able to access programming that they previously would not have had the option of receiving prior to the merger, unless they subscribed to both services for $25.90 per month.167

Additionally, permitting the merger will allow such programming to become more diverse. Since the two companies currently have significant overlap in their channel lineups, a merger will allow them to consolidate this redundant programming, "freeing capacity for even more diverse offerings that are not currently available on either company's system, including expanded non-English language programming, children's programming, and additional programming aimed at minority and other underserved populations."168 If, however, the merger is denied, the individual companies will be forced to maintain redundant channels "in order to retain and attract customers."169

Another benefit of the merger is that it will offer "consumers access to advanced technology sooner than would otherwise occur."170 This occurs because, after the merger, their engineering organizations will also merge.171 "The common engineering standards and protocols which would come from a combined effort will accelerate the involvement of third party manufacturers and technology partners in developing and offering innovative devices and services."172

2. Comparing the XM-Sirius Merger to Previously Proposed Mergers

Although the XM-Sirius merger looks similar to the EchoStar-DirecTV merger on its face,173 there is one significant difference: XM and Sirius are no longer in competition against one another. Therefore, unlike the proposed EchoStar-DirecTV merger, the proposed XM-Sirius merger will have no effect on competition in the market. In the EchoStar-DirecTV

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167 See id. at 11.
168 Consolidated Application, supra note 3, at 12-13. Regarding channel redundancy, there are currently twelve identical channels between Sirius and XM, and another seventy-five channels that overlap according to their genre, which indicates a substantial amount of similar content. Id.
169 Id. at 13.
170 Id. at 14.
171 Id.
172 Consolidated Application, supra note 3, at 15.
173 These proposed mergers have multiple similarities: seeking to combine two satellite licenses into one, claiming as benefits the ability to eliminate overlapping programming and creating more niche programming, being better positioned to compete with the rest of the market, and not actually competing against one another. See generally Application of EchoStar Commc'ns Corp., General Motors Corp., and Hughes Elecs. Corp., Transferors, and EchoStar Commc'ns Corp., Transferee, 17 F.C.C.R. 20,559 (2002); Consolidated Application, supra note 3.
merger, one of the biggest flaws the FCC found in the applicants' argument was their claim that they did not compete against one another. This argument was clearly undercut by the fact that EchoStar had filed an antitrust suit against DirecTV, proving that they were in competition with one another and not necessarily competing against the cable providers. Unlike EchoStar and DirecTV, however, XM and Sirius have never filed an antitrust suit against one another, nor are there any recent significant indications of competition between the two companies. Instead, as previously discussed in Part IV.B.2, there is overwhelming evidence that satellite radio as a whole competes with the other various forms of the radio market. Moreover, as indicated in Part IV.B.1, the DOJ found that although XM and Sirius did compete in the past to attract new subscribers, there was never any competition with existing subscribers and competition as to new subscribers is currently substantially limited. Therefore, since the proposed XM-Sirius merger has been labeled by the DOJ as not anticompetitive, it is distinctly different from the proposed EchoStar-DirecTV merger and should be approved.

Analogous to how the DirecTV-Liberty Media merger eliminated media consolidation, the XM-Sirius merger will have the same effect. If XM and Sirius continue to operate without turning a profit they may not survive without a merger. This would leave no satellite radio providers in the United States and would lead to a consolidation of media services, resulting in the foreclosure of the satellite radio market. And although new providers may be able to "step into the shoes" of XM and Sirius, they may not want to, realizing the detrimental financial conditions suffered by XM and Sirius. Therefore, similar to the reason that the FCC approved the DirecTV-Liberty Media merger, it should approve the XM-Sirius merger. Moreover, unlike Liberty Media and DirecTV, XM and Sirius are able to prove how and why

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174EchoStar-DirecTV Merger, 17 F.C.C.R. at 20,622.
175Id. at 20,623.
177Some analysts believe that, because neither XM nor Sirius is profitable, "a merger might be necessary in order for the two satellite radio companies to remain economically viable." Paul R. La Monica, Bad Reception for Sirius and XM, CNN, Mar. 26, 2007, http://money.cnn.com/2007/03/26/news/companies/sirius_xm/index.htm. In fact, Richard Dorfman, a managing director with Richard Alan Inc., stated, "There's no benefit for the government to not let the deal go through . . . . These are struggling companies that some folks say will not survive without a merger." Id.; see also Orbitcast, John Dvorak: Let Them Merge, Will You?, ORBITCAST, Dec. 11, 2007, http://www.orbitcast.com/archives/john-dvorak-let-them-merge-will-you.html (noting a possible scenario whereby a blocked merger could cause XM and Sirius to go broke); Eliot Van Buskirk, Group Wants to Block Sirius/XM Merger, Feb. 20, 2008, http://blog.wired.com/music/2008/02/group-wants-to.html ("[S]ome analysts say that Sirius and XM may not survive even in combined form, as the internet reaches into more homes and cars. A market without satellite radio would surely be more restricted than a market that contained it.").
their transaction will lead to greater innovation. As noted in Part IV.D.1, the merging of the engineering departments of XM and Sirius will significantly promote the development of devices and services. This is a clear benefit that may only occur if the two companies are permitted to merge.

3. Shareholders' Opinion

Aside from comparing the harms and the benefits, the most important inquiry should be determining what the public wants—since this is a "public interest" analysis. On November 13, 2007, Sirius and XM, individually, allowed their shareholders to vote on whether or not they agreed with the proposed merger and the end result was more than supportive. "The preliminary tabulation indicates that more than 96% of the shares voted were cast in favor of the transaction" by Sirius shareholders, and 99.8% by XM shareholders. At such a high percentage of votes in favor of the transaction, the satellite radio shareholders clearly believe that this merger will serve the public interest. Although it may be argued that this only indicates that shareholders will believe their share price will go up, which is partially true, that is not the only belief. Essentially, share prices and public interest are analogous: if the public interest is served, most likely share prices will increase because "share prices follow earnings." Therefore, if the public interest is served, more people will seek to purchase satellite radio (being that there are better deals, more channels, and other benefits as discussed in this comment), which increases earnings and essentially share prices.

178 Consolidated Application, supra note 3, at 14-15.
180 See supra note 179.
181 Mike Caggeso, FCC Chairman Considers Sirius-XM Merger "in the Public Interest," SEEKING ALPHA, June 17, 2008, http://seekingalpha.com/article/81595-fcc-chairman-considers-sirius-xm-merger-in-the-public-interest (discussing an opinion that investors should not invest in the merged XM-Sirius entity because share prices follow earnings, and most likely earnings will not increase). Although Lou Basenese, an M&A expert, gives an opinion contrary to the argument of this comment, he still supports the proposition that share prices follow earnings. This comment believes earnings will increase if the public interest is served. Basenese believes earnings will not increase, regardless of the merger, because the companies have so much debt. See id.
V. CONCLUSION

For the foregoing reasons, this comment stands for the proposition that Sirius and XM should be permitted to merge. Not only are the critical arguments of the potential public interest harms unpersuasive, but there is plenty of competition available to rival satellite radio and a clear indication that the public interest benefits outweigh the possible public interest harms. Furthermore, two of the biggest factors considered should be the fact that the shareholders have voted and clearly support the proposed merger, and so does the DOJ.

Even if the FCC had any hesitation as to whether or not to grant the merger, it could ease such qualms by instituting conditions, just as it did in the DirecTV-Liberty Media merger. A possible condition of the merger, for example, could require that the combined XM-Sirius entity sever some of XM's and Sirius's exclusive deals with national news and entertainment services so as not to block out opportunities for terrestrial and Internet radio. Therefore, because the public interest benefits are so compelling in this application, and because the FCC has the ability to impose conditions on the merger if it so desires, the FCC should approve the proposed merger.182

Joel D. Corriero

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182 As predicted, on July 28, 2008, the FCC voted to approve the proposed merger between Sirius and XM. The FCC concluded that the merger "is in the public interest." Press Release, supra note 1, at 1.