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## COMMENTS

### SIRIUS MISTAKE: THE FCC'S FAILURE TO STOP A MERGER TO MONOPOLY IN SATELLITE RADIO

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#### TABLE OF CONTENTS

Introduction.....	84
I. Background .....	87
A. Applicable Framework for Antitrust Analysis of Horizontal Mergers .....	87
B. Framework for FCC Merger Analysis.....	90
C. The Sirius XM Merger and the Backdrop of Satellite Radio Competition.....	91
II. Assessing the FCC's Merger Analysis .....	94
A. The Battle Over Market Definition: Satellite Radio or Audio Entertainment Services?.....	94
B. The Dramatic Increase in Post-Merger Market Concentration Suggested the Merger Would Produce Anticompetitive Effects .....	100
C. The Merger Order Did Not Cure the Competitive Problems of the Transaction Because it Failed to Regulate Indirect Price Manipulation and Implicit Pricing Elements in Satellite Radio .....	102
D. High Barriers to Entry in the Satellite Radio Market Increased the Anticompetitive Effects of the Merger.....	105

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E. The Efficiencies and Conditions Generated by the Merger Were Insufficient to Overcome the Probable Anticompetitive Effects .....	107
III. An Echo from the Past: Distinguishing a Satellite Television Merger.....	112
A. The FCC's Previous Review of the EchoStar Merger Shared Many Similarities with Sirius XM .....	112
B. Both Mergers Significantly Increased the Market Concentration in Already Highly Concentrated Markets.....	113
C. Significant Barriers to Entry Existed in Both Markets.....	115
D. Although Similar Efficiencies and Conditions Were Agreed to by the Merging Parties, the EchoStar Order and Merger Order Reached Different Outcomes .....	115
E. Applicants in Both Mergers Had Checkered Histories of Complying with FCC Rules, Calling into Question Whether they Would Comply with Post-Merger Conditions .....	117
F. The FCC's Attempt to Distinguish the Two Mergers Failed to Explain Why EchoStar Was Denied and Sirius XM Approved.....	118
IV. The Solution: Handcuff the FCC's Antitrust Authority or Lock it Up and Throw Away the Key? .....	120
Conclusion .....	124

#### INTRODUCTION

Before there was uncensored Howard Stern, there was spectrum—spectrum that represented the future of satellite radio.<sup>1</sup> This spectrum was licensed by the Federal Communications Commission (“FCC” or “Commission”) and auctioned off to companies intent on revolutionizing radio.<sup>2</sup> As a prospective purchaser of these radio frequencies, CD Radio offered comments to the Commission regarding the rules and policies that should govern this new service.<sup>3</sup> Among its many contentions, CD Radio argued that

1. Radio spectrum is the portion of the electromagnetic spectrum where radio frequencies reside. FCC Radio Spectrum Home Page, <http://www.fcc.gov/oet/spectrum/> (last visited Sept. 28, 2009). In other words, the Federal Communications Commission (“FCC”) acts as a gatekeeper for radio stations—without allocating spectrum to providers, radio stations would have no frequencies from which to broadcast. *Id.*

2. The FCC allotted spectrum in the S band for the implementation of satellite radio and then conducted an auction to allocate those frequencies to satellite radio providers. *See generally In re Establishment of Rules & Policies for the Digital Audio Radio Satellite Service in the 2310–2360 MHz Frequency Band*, 12 F.C.C.R. 5754 (1997) [hereinafter *Satellite Radio Order*] (setting forth the procedures and policies for satellite radio).

3. Comments of CD Radio, *In re Establishment of Rules & Policies for the Digital Audio Radio Satellite Service in the 2310–2360 MHz Frequency Band*, FCC IB Docket No. 95–91 (Sept. 15, 1995) [hereinafter *Comments of CD Radio*].

satellite radio companies should never be allowed to merge.<sup>4</sup> If one company acquired a second in a market of only four providers, the merger would put the other two licensees “at a serious competitive disadvantage,” leaving them no choice but to merge themselves.<sup>5</sup> Under these conditions, the prospects for a satellite radio monopoly “would loom on the horizon.”<sup>6</sup> CD Radio further predicted that “[s]uch a development would have serious anticompetitive repercussions.”<sup>7</sup> The FCC agreed and accordingly instituted a rule prohibiting satellite radio providers from merging.<sup>8</sup>

Almost fifteen years later, CD Radio suddenly had a change of heart.<sup>9</sup> Now operating under the name Sirius Satellite Radio,<sup>10</sup> the company sought to merge with its rival, XM Radio, and fervently declared that the consolidation of satellite radio services in the hands of one provider would serve the public interest and enhance competition.<sup>11</sup> But Sirius was not the only one to have second thoughts about a satellite radio monopoly. The FCC similarly abandoned its position regarding mergers and determined that single ownership of satellite radio would be in the public interest.<sup>12</sup>

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4. *See id.* at 18 (advocating for four satellite radio providers to hold an equal share of the allotted 50 MHz for Satellite Digital Audio Radio Service (SDARS)).

5. *Id.* While the FCC originally set aside 50 MHz for satellite radio, the Omnibus Consolidated Appropriations Act required the Commission to reallocate 25 MHz of that spectrum for other use. Satellite Radio Order, 12 F.C.C.R. at 5756 n.2. Accordingly, the remaining 25 MHz, between 2320 and 2345 MHz, were auctioned off to only two licensees instead of four. *Id.*

6. Comments of CD Radio, *supra* note 3, at 18 n.31.

7. *Id.* at 18.

8. *See* Satellite Radio Order, 12 F.C.C.R. at 5823 (prohibiting one licensee from “acquir[ing] control of the other remaining satellite DARS license”).

9. *See* Consolidated Comments of Sirius Satellite Radio Inc. & XM Satellite Radio Holdings Inc., Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57 (Aug. 13, 2007) [hereinafter Sirius Consolidated Comments] (petitioning the FCC to disregard its previous policy of prohibiting single ownership of all satellite radio spectrum in order to allow Sirius and XM to merge).

10. In 1999, CD Radio officially changed its name to Sirius Satellite Radio to increase its recognition and create a distinct brand name. *CD Radio Becomes Sirius Satellite Radio*, AUDIO WEEK, Nov. 22, 1999.

11. *See* Sirius Consolidated Comments, *supra* note 9, at 7–8 (arguing that the proposed merger would “generate substantial efficiencies” and provide “public benefits” because Sirius and XM were competing against other forms of audio entertainment in a larger market).

12. *See* Memorandum Opinion & Order & Report & Order, Applications for Consent to the Transfer of Control of Licenses, XM Satellite Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, 23 F.C.C.R. 12348, 12349 (2008) [hereinafter Merger Order] (granting the merger between Sirius and XM because of the consumer benefits created by the merger and because of the voluntary commitments made by the parties to mitigate the competitive concerns).

The Sirius XM merger took over five hundred days to gain approval and elicited more than 15,000 comments from interested parties and consumers longing to listen to Oprah and Howard Stern on one provider.<sup>13</sup> In the end, the FCC approved the merger application and granted 25 MHz of spectrum, more spectrum than both AM and FM radio combined, to one entity.<sup>14</sup> However, several months after the merger, when consumers began to feel the effects of the deal they formerly championed, many subscribers began to have doubts.<sup>15</sup> Now, more than a year after the consummation of the merger, consumers are filing more comments with the FCC, and their tone has transformed from one of overwhelming support to one of anger and outrage.<sup>16</sup> The anticompetitive outcome of a satellite radio monopoly, predicted, ironically enough, by Sirius Satellite Radio, has come to fruition.

This Comment will argue that the FCC failed to properly assess the harm to competition inherent in the Sirius XM merger and, as a result, has given the merged entity the ability to raise prices and reduce output—the very evil antitrust law seeks to proscribe. In its faulty antitrust analysis, the Commission failed to follow the merger assessment guidelines suggested by the antitrust agencies, allowing inadequate efficiency justifications to override valid antitrust concerns. Upon proper consideration, the merger application should have been denied by the FCC, or, at the very least, designated for hearing pursuant to section 309(e) of the Communications Act of 1934.<sup>17</sup>

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13. FCC Electronic Comment Filing System, [http://fjallfoss.fcc.gov/prod/ecfs/comsrch\\_v2.cgi](http://fjallfoss.fcc.gov/prod/ecfs/comsrch_v2.cgi) (enter “07-57” in the “Proceeding” field; then click “Retrieve Document List”) (last visited Sept. 28, 2009). The Sirius XM merger was proposed on February 19, 2007 and gained FCC approval on July 25, 2008. *Merger Order*, 23 F.C.C.R. at 12358.

14. *See* *Merger Order*, 23 F.C.C.R. at 12445 (Adelstein, Comm’r, dissenting) (questioning the majority’s willingness to repeal its rule against single ownership of all satellite radio spectrum and granting this merger based solely on “nominal conditions”).

15. Particularly troubling to many long-time subscribers was the increase in fees for customers with more than one account and the charge for Internet streaming, a service that was previously free to all subscribers. *See infra* notes 267–268 and accompanying text (discussing a subscriber’s dissatisfaction with the post-merger channel line-up and additional fees incurred after the consummation of the merger).

16. *See, e.g.*, FCC Electronic Comment Filing System, *supra* note 13, Comment of Rob Firnstein (Jan. 29, 2009) (questioning why the price of his satellite radio subscription had increased when the FCC imposed a price cap on Sirius XM).

17. *See* 47 U.S.C. § 309(e) (2006) (allowing the Commission to designate any licensing matter for hearing when it fails to find that the application is in the public interest).

Part I of this Comment will discuss the proper framework for analyzing horizontal mergers under both the Department of Justice guidelines and the applicable FCC standards. Furthermore, it will supply relevant background information regarding the Sirius XM merger, including the terms and conditions agreed to by the parties. Part II of this Comment will assess the FCC's merger analysis and its willful blindness to the anticompetitive aspects of the transaction. In particular, it will show that the FCC failed to adduce evidence to define the relevant product market, ignored entry considerations, and placed unprecedented weight on efficiency justifications that do not overcome the anticompetitive effects of the merger.

Part III analogizes the FCC's examination of the Sirius XM merger to the FCC's disapproval of a recent similar merger application involving satellite television, demonstrating its inexplicable departure from both rule and precedent. Finally, Part IV argues that the proposed Sirius XM merger should, at the very least, have been designated for a hearing before an Administrative Law Judge to further examine the probable effects of the transaction. This section also recommends that because the FCC's competitive review process is susceptible to political and lobbying pressures and is not bound to strict, formulaic standards, Congress should renew its efforts to restrict or remove the FCC's authority to review mergers.

## I. BACKGROUND

### A. *Applicable Framework for Antitrust Analysis of Horizontal Mergers*

Merger analysis seeks to prevent anticompetitive conduct by firms possessing market power.<sup>18</sup> Market power is the ability of one firm to successfully raise prices and reduce output for a significant period of time without losing so many customers as to make the price increase unprofitable.<sup>19</sup> Most horizontal mergers<sup>20</sup> are analyzed under section 7 of the Clayton Act, which proscribes mergers that “substantially . . .

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18. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (rev. ed. 1997) [hereinafter MERGER GUIDELINES], *available at* <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf> (“The uniform theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.”).

19. *Id.*

20. A horizontal merger is “[a]n economic arrangement between companies performing similar functions in the production or sale of comparable goods or services,” while vertical mergers are “economic arrangements between companies standing in a supplier-customer relationship.” Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 760 n.64 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 334 (1962)) (internal quotation marks omitted).

lessen competition.”<sup>21</sup> This is a prospective analysis that requires the reviewing agency to make a prediction about the likely competitive effects of a deal before it is consummated.<sup>22</sup>

The FCC and the Department of Justice’s Antitrust Division (“DOJ” or “Division”) have concurrent authority to review telecommunications mergers.<sup>23</sup> The DOJ’s jurisdiction emanates from section 7 of the Clayton Act, whereby the Department focuses exclusively on competition issues presented by the particular aspects of the proposed transaction.<sup>24</sup> By contrast, the FCC’s grant of authority stems, not only from section 7, but more commonly from section 310(d) of the Communications Act.<sup>25</sup> The FCC’s inquiry takes a broader approach than the DOJ’s, focusing primarily on whether the merger serves the “public interest,” rather than focusing exclusively on the competitive implications.<sup>26</sup>

After the FCC and DOJ review a telecommunications merger under each agency’s particularized, albeit similar, lens, the agencies may seek distinct recourses if either the FCC finds that the merger is not in the public interest, or if the DOJ concludes that the merger will

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21. See 15 U.S.C. § 18 (2006) (prohibiting any “person engaged in commerce” from acquiring assets where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”).

22. See Lawrence Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 163–64 (2008) (remarking that predicting the future of a complex industrial economy is always a difficult and uncertain task).

23. See generally James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 COMM.LAW CONSP. 195, 197 (1998) (reviewing the principle aspects of the overlapping agency authority over telecommunications mergers and the increased costs associated with dual agency review). In general, merger analysis is reviewed by the two antitrust agencies—the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”). *Id.* at 196–97. To avoid overlapping review, these agencies implement a “clearance” process, whereby the FTC and DOJ mutually agree which agency will review a particular merger based on the specific facts of the transaction and whether the agency possesses an expertise in that specific area. *Id.* at 197 n.19. However, the Clayton Act precludes the FTC from reviewing mergers and acquisitions between common carriers and instead vests such power in the FCC. *Id.* FTC involvement in telecommunications mergers, therefore, is limited to cable and mass media mergers. *Id.*

24. *Id.* at 198.

25. See *id.* (finding that the FCC normally exercises its merger review through the Communications Act, while only “paying lip service” to its authority under the Clayton Act); see also 47 U.S.C. § 310(d) (2006) (prohibiting the transfer of any license except upon application to the Commission and a finding that the transfer serves the “public interest, convenience, and necessity”).

26. Weiss & Stern, *supra* note 23, at 198. The public interest analysis is intended to carry out the goals of the Communications Act, which include not only competitive considerations, but also such factors as “universal service, national security, spectrum efficiency, technological innovation, and the diversity of views and content.” *Id.*

substantially lessen competition.<sup>27</sup> If the DOJ's review reveals anticompetitive problems, the Department may move to enjoin the merger in federal court.<sup>28</sup> Generally, when the FCC finds competitive problems in a proposed transaction, it will solicit concessions from both parties to satisfy the FCC's public interest standard.<sup>29</sup> However, if the parties' concessions do not move the FCC to approve the transaction, the Commission may set the matter for hearing before an Administrative Law Judge ("ALJ").<sup>30</sup> After a decision is rendered by the ALJ, the five FCC Commissioners reconvene and, taking into account the ALJ's decision, vote again on whether to approve the merger.<sup>31</sup>

The traditional antitrust framework governing the DOJ's review is set forth in the *Horizontal Merger Guidelines* ("Merger Guidelines") created jointly by the two antitrust agencies, the DOJ and the Federal Trade Commission ("FTC").<sup>32</sup> These guidelines outline a five-step process for determining the possible anticompetitive effects of a merger.<sup>33</sup> First, the agency must determine the relevant geographic and product markets and assess whether the merger would significantly increase concentration in those markets.<sup>34</sup> Second, in light of the change in market concentration, the agency must assess the potential anticompetitive effects of the merger.<sup>35</sup> Third, the

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27. *See id.* at 201–05 (examining the concurrent jurisdiction of the DOJ and FCC in the context of three telecommunications mergers where the agencies took opposite approaches—the DOJ found no harm to competition, while the FCC expressed significant competitive concerns and elicited major concessions from the merging parties before finally approving the deal).

28. *See* Frankel, *supra* note 22, at 161 (noting that the majority of mergers do not create antitrust concerns and that "with very few exceptions the only mergers raising competitive issues . . . are horizontal mergers . . . in highly concentrated markets").

29. *Id.* at 201. Third parties may challenge the FCC's determination in a federal appeals court, which reviews the order under a deferential "arbitrary and capricious" standard. *Id.* at 202.

30. *Id.* at 202; *see also infra* note 245 (discussing the rarity of FCC decisions designating a merger review for hearing).

31. Frankel, *supra* note 22, at 202. It should be noted that the FCC rarely challenges mergers that the antitrust agencies approve. *See* Hillary Greene, *Guideline Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 847 (2006) (relating that though the FCC will rarely challenge an antitrust agency's approval of a merger, the FCC may condition its approval on changes to the proposed merger).

32. MERGER GUIDELINES, *supra* note 18.

33. *Id.* at 3.

34. *Id.* at 4. The *Merger Guidelines* define a market as "a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm . . . would impose at least a 'small but significant and nontransitory' increase in price." *Id.* A relevant market should be "a group of products and a geographic area that is no bigger than necessary to satisfy this test." *Id.*

35. *Id.* at 18. The anticompetitive effects could arise from either coordinated effects among the firms left in the market or through unilateral effects by one firm

agency must determine if another firm could easily enter the relevant market and counteract the potential adverse effects of a firm exercising market power.<sup>36</sup> Fourth, the agency must assess whether any efficiencies generated from the merger will outweigh the possible anticompetitive effects.<sup>37</sup> Finally, if a party to the transaction is likely to fail and exit the market absent the merger, the agency will commonly find that the merger poses no threat to competition.<sup>38</sup>

### B. Framework for FCC Merger Analysis

While the *Merger Guidelines* heavily influence FTC and DOJ merger review, the FCC is free to perform an unstructured analysis that is unconstrained by the antitrust agencies' standards.<sup>39</sup> The FCC's standard of review requires the agency to determine whether the parties have sufficiently demonstrated that the proposed transaction "will serve the public interest, convenience, and necessity."<sup>40</sup> This framework employs a balancing process that weights the

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possessing market power. *Id.* at 18, 22. Coordinated competitive effects arise when the merger transforms the market into an oligopoly, which facilitates firms coming together to agree on price and output restrictions. *Id.* at 18. Unilateral competitive effects arise when the merger leaves one dominant firm in the market with the ability to unilaterally raise prices and reduce output. *Id.* at 22.

36. *Id.* at 25. Entry must be "timely, likely, and sufficient" to deter or counteract the anticompetitive effects posed by the merger. *Id.* at 25–27. Entry is timely if it can be accomplished within two years. *Id.* at 27. Entry is likely if a potential entrant would find it profitable to enter the market. *Id.* at 28. Finally, entry is sufficient if a firm entering the market would be able to counteract supra-competitive pricing by forcing market conditions to pre-merger levels. *Id.* at 29.

37. *Id.* at 30. The agency may only consider "cognizable efficiencies," meaning that they must be merger-specific, verifiable, and must not arise from anticompetitive reductions in output or service. *Id.* at 31.

38. *Id.* at 30. The failing firm defense is not applicable to the Sirius XM merger because neither company qualified as a firm that would otherwise exit the market absent the merger. See Merger Order, 23 F.C.C.R. 12348, 12444 (2008) (Copps, Comm'r, dissenting) (conceding a willingness "to consider mergers where financial viability is at stake," but noting that neither company here claimed financial distress).

39. See Greene, *supra* note 31, at 846 (asserting that the FCC's competitive review extends beyond that of the DOJ and FTC and that the FCC has intentionally resisted formulating "enforcement guidelines that would, invariably, lead to persistent comparisons to the antitrust merger guidelines").

40. Merger Order, 23 F.C.C.R. at 12363. The public interest standard was promulgated under 47 U.S.C. § 310(d). *Id.* For a discussion regarding the efficacy of the public interest standard and its compatibility with antitrust enforcement in media markets, see Howard Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 374 (2006) (arguing that "antitrust will not only be a poor vehicle for achieving non-economic quality and diversity objectives, but will also achieve its conventional goals of competitive efficiency in mass media markets less effectively than in other industries").

potential harms against the benefits of the transaction.<sup>41</sup> The public interest analysis reflects “a deeply rooted preference for preserving and enhancing competition in relevant markets.”<sup>42</sup> To that end, the FCC’s competitive analysis, compared to the DOJ’s standard, considers “whether a transaction will enhance, rather than merely preserve, existing competition.”<sup>43</sup>

While this framework illustrates several differences between the FCC and DOJ merger analyses, the two agencies often overlap in their review of horizontal transactions.<sup>44</sup> Although the *Merger Guidelines* do not necessarily bind the FCC, the applicable framework certainly informs and shapes its analysis.<sup>45</sup> A division of thought has centered on whether this jurisdictional overlap is necessary.<sup>46</sup> While some argue that the duplicative review is costly, time-consuming, and overly burdensome on the merging parties, others argue that the unique expertise of each agency provides a more comprehensive review of telecommunications mergers.<sup>47</sup>

C. *The Sirius XM Merger and the Backdrop of Satellite Radio Competition*

On February 19, 2007, Sirius and XM announced their plan to merge.<sup>48</sup> Five hundred and twenty-two days later, the FCC removed the last hurdle and permitted the two satellite radio providers to

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41. Merger Order, 23 F.C.C.R. at 12364. The parties to the merger bear the burden of proving that the transaction will serve the public interest by a preponderance of the evidence. *Id.*

42. *Id.* at 12364–65. This preference is drawn out in the Communications Act, which states that the purpose of the statute is to promote competition and diversity and “minimize unnecessary regulation.” 47 U.S.C. §§ 521(6) (2006).

43. See Merger Order, 23 F.C.C.R. at 12366 (noting that the FCC “takes a more expansive view of potential and future competition and its impact on the relevant market”).

44. See *supra* note 23 and accompanying text (discussing the concurrent authority of the DOJ and FCC to review mergers).

45. See Greene, *supra* note 31, at 847 (finding that although the FCC’s merger analysis allows the agency greater independence in its determinations, “it does not necessarily follow that the FCC’s internal deliberations were not heavily influenced by the merger guidelines”); see also Merger Order, 23 F.C.C.R. at 12372–76 (following the *Merger Guidelines* analysis by examining market definition and concentration, potential anticompetitive effects, entry, and efficiencies of the Sirius XM merger).

46. See generally Weiss & Stern, *supra* note 23, at 195–208 (examining and evaluating the scope and efficacy of the FCC and the DOJ’s review of telecommunications mergers).

47. See *id.* at 205–08 (noting that although dual agency review has substantive and procedural inefficiencies, the FCC’s public interest standard allows it to consider the unique characteristics of the telecommunications industry, while the DOJ’s authority pursuant to the Clayton Act ensures that these transactions conform with antitrust law).

48. See Merger Order, 23 F.C.C.R. at 12358 (describing the merger agreement between Sirius and XM, whereby Sirius would be the surviving corporation holding all Commission licenses and authorizations of both companies).

become Sirius XM.<sup>49</sup> In doing so, the Commission granted 25 MHz of spectrum—the entire band of spectrum allocated for satellite radio—to one entity, in violation of its own rule against single ownership of all satellite radio spectrum.<sup>50</sup> The rule prohibiting single ownership originated in the FCC’s order granting spectrum for satellite digital audio radio service (“SDARS”) in 1997.<sup>51</sup> In the Satellite Radio Order, the Commission noted that licensing two service providers would ensure competition and diversity in SDARS.<sup>52</sup> To that end, the FCC implemented a safeguard that prohibited single ownership of the entire band of satellite radio spectrum.<sup>53</sup> Although the Merger Order approving the Sirius XM transaction found that the Satellite Radio Order created a binding substantive rule,<sup>54</sup> the Commission also determined that the public interest would be served by repealing the rule against single ownership.<sup>55</sup>

While the FCC’s approval may have been the last hurdle for Sirius and XM, it was certainly not the first. The DOJ Antitrust Division conducted its own investigation of the merger and, on March 24, 2008, concluded that the transaction posed no competitive threats.<sup>56</sup> FCC Commissioner Jonathan S. Adelstein called the DOJ’s decision questionable, in part because the Division found a lack of competition between the two providers after determining that an

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49. *See id.* at 12420–23 (repealing the rule against single ownership of satellite radio spectrum because the merger would benefit consumers by providing a wider array of channels and affording them greater control over those channels).

50. *See infra* note 55 and accompanying text (discussing the FCC’s decision to repeal this rule contemporaneous with its decision to approve the Sirius XM merger).

51. Satellite Radio Order, 12 F.C.C.R. 5754, 5823 (1997).

52. *See id.* at 5786 (stating that the Commission’s goal in providing spectrum for SDARS was “to create as competitive a market structure as possible”).

53. *See id.* at 5823 (prohibiting one licensee from acquiring control of the other remaining SDARS license).

54. Sirius and XM argued that because the single ownership rule was not published in the Code of Federal Regulations, it was not a binding rule but rather a general policy statement. Merger Order, 23 F.C.C.R. at 12421–22. The FCC rejected this argument, in part because the D.C. Circuit had refused to place determinative weight on the publication factor in deciding what agency rules were binding. *Id.* (citing *Health Ins. Ass’n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994)).

55. *See id.* at 12422–23 (determining that the increased programming options would outweigh any harms from single ownership of satellite radio).

56. *See* Press Release, Dep’t of Justice, Antitrust Division, Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.’s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008) [hereinafter DOJ Press Release], available at [http://www.usdoj.gov/opa/pr/2008/March/08\\_at\\_226.html](http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html) (finding no anticompetitive effects of the merger because of “a lack of competition between the parties in important segments even without the merger; the competitive alternative services available to consumers; technological change that is expected to make those alternatives increasingly attractive over time; and efficiencies likely to flow from the transaction that could benefit consumers”).

interoperable radio did not exist.<sup>57</sup> Without a radio capable of receiving both XM and Sirius, consumers could not easily switch from one provider to the other without incurring significant switching costs.<sup>58</sup> Ironically, this justification for approving the merger was, in fact, the flouting of a previous FCC mandate.<sup>59</sup> The Satellite Radio Order required the licensees to develop and market an interoperable radio to ensure robust competition between the two companies.<sup>60</sup> Not only did Sirius and XM fail to market such a device after eleven years, but their noncompliance served as justification for the DOJ merger approval.<sup>61</sup>

After the DOJ's rubber stamp,<sup>62</sup> the FCC continued its deliberation for another four months.<sup>63</sup> In a ruling wrought with emotion and turmoil, the five Commissioners finally voted to approve the merger on July 25, 2008, in a 3-2 decision, split down party lines.<sup>64</sup> As dissenting Commissioner Michael J. Copps noted, the "majority's own findings provide a compelling case for rejecting this merger."<sup>65</sup> The Merger Order admitted that it was approving a merger to monopoly, and that the merged entity would have the ability and

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57. Merger Order, 23 F.C.C.R. at 12446 (Adelstein, Comm'r, dissenting).

58. *Id.*

59. See 47 C.F.R. § 25.144(a)(3)(ii) (2008) (requiring each satellite radio provider to "[c]ertify that its satellite DARS system includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction").

60. See Satellite Radio Order, 12 F.C.C.R. 5754, 5796 (1997) (noting that this requirement would "promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers").

61. See DOJ Press Release, *supra* note 56 (concluding that because no interoperable radio was on the market and evidence showed that subscribers "rarely switch[ed] between XM and Sirius," there had "never been significant competition between them").

62. See *infra* notes 260–262 and accompanying text (discussing the hands-off approach to merger enforcement under the Bush administration and the influence of that policy on the questionable decision by the DOJ not to challenge the Sirius XM merger).

63. See Merger Order, 23 F.C.C.R. at 12363 (noting that the DOJ issued the decision to close its investigation into the merger on March 24, 2008). The FCC adopted its opinion and order on July 25, 2008, and released that order on August 5, 2008. *Id.* at 12348.

64. Martin Bosworth & Truman Lewis, *A Done Deal: XM-Sirius Merger Wins Approval*, CONSUMER AFFAIRS, July 26, 2008, [http://www.consumeraffairs.com/news04/2008/07/xm\\_sirius\\_approval.html](http://www.consumeraffairs.com/news04/2008/07/xm_sirius_approval.html). Republican Chairman Kevin Martin voiced approval for the merger shortly after the DOJ ended its investigation. *Id.* Fellow Republican Commissioner Robert McDowell expressed early support for the merger as well, while their Democratic counterparts, Commissioners Jonathan Adelstein and Michael Copps, opposed the deal. *Id.* Republican Commissioner Deborah Taylor Tate remained neutral, leaving the vote deadlocked and Tate the tie-breaker. *Id.* Not until both companies committed to further conditions and settled their outstanding fines for violations of Commission rules did Tate cast her deciding ballot in favor of the merger. *Id.*

65. Merger Order, 23 F.C.C.R. at 12443 (Copps, Comm'r, dissenting).

incentive to raise prices, while entry of another competitor remained impracticable and unlikely to deter anticompetitive behavior.<sup>66</sup> However, because the two parties agreed to certain conditions and claimed the deal would produce merger-specific efficiencies, the Commission approved the parties' application.<sup>67</sup> The most prominent of these conditions included: a three-year price cap on subscription rates; a la carte channel options; set-asides for noncommercial educational or informational programming and diversity programming for qualified entities; and designing and marketing an interoperable radio.<sup>68</sup> The majority of the Commission praised these conditions and efficiencies as creating substantial consumer benefits, allowing customers more package options and increased content.<sup>69</sup> Other Commissioners had a different opinion: reflecting on the "torturous and excessively long period during which this merger was under consideration," dissenting Commissioner Adelstein noted that "[i]t is remarkable that the Commission took so long to do so little."<sup>70</sup>

## II. ASSESSING THE FCC'S MERGER ANALYSIS

### A. *The Battle Over Market Definition: Satellite Radio or Audio Entertainment Services?*

In order to determine the increase in market concentration that will occur as a result of a merger, it is first vital to identify the relevant market.<sup>71</sup> The relevant product market is defined as "the smallest group of competing products for which a hypothetical monopoly

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66. *See id.* at 12352 (majority opinion) (concluding that the proposed merger would "increase the likelihood of harms to competition and diversity").

67. *See id.* (determining that the voluntary commitments entered into by the parties were enough "to mitigate harms and achieve public interest benefits" and conditioning approval of the merger on the Applicants' compliance with these conditions).

68. *Id.* at 12359.

69. *Id.* at 12442 (statement of Chairman Martin) (conceding initial skepticism of the merger but ultimately concluding that the Applicants overcame this doubt by providing consumers with more flexibility in their subscription choices, which would result in lower prices).

70. *Id.* at 12445-50 (Adelstein, Comm'r, dissenting) (expressing disappointment over the failure to reach a consensus on "more diversity in programming, better price protection, greater choices among innovative devices and real competition with digital terrestrial radio").

71. MERGER GUIDELINES, *supra* note 18, at 4 (providing standard procedures for horizontal merger analysis used by the FTC and the DOJ). The relevant market includes a determination of the relevant product and geographic markets. *Id.* Although this Comment discusses only the relevant product market, the FCC also failed to conclusively determine the relevant geographic market and proceeded by assuming a national geographic market. Merger Order, 23 F.C.C.R. at 12372.

provider of the products would profitably impose at least a ‘small but significant and non-transitory increase in price.’<sup>72</sup> The inquiry focuses on substitutes—in this case, if the price of satellite radio were to increase, would consumers switch to another source of audio entertainment? This is called cross-elasticity of demand.<sup>73</sup> If a market is highly inelastic, a firm could significantly increase price without losing a significant number of customers.<sup>74</sup> This type of market facilitates supra-competitive pricing by a firm possessing market power.<sup>75</sup>

Generally, antitrust defendants will advocate for recognizing a larger market to make their share of that market seem as small and competitively insignificant as possible.<sup>76</sup> Not surprisingly then, Sirius and XM argued that the relevant product market should be expanded to include not just satellite radio, but all “audio entertainment services,” including iPods, MP3 players, CD players, mobile phones, Internet and HD radio, and terrestrial radio.<sup>77</sup> Although the DOJ concluded that satellite radio was not a relevant product market,<sup>78</sup> the FCC dodged the question altogether, finding

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72. Merger Order, 23 F.C.C.R. at 12367 (quoting MERGER GUIDELINES, *supra* note 18, at 4).

73. *See id.* at 12368–69 & n.142 (concluding that no commenter provided sufficient evidence of own-price and cross-price elasticities to determine the product market).

74. *See* J. Gregory Sidak & Hal J. Singer, *Evaluating Market Power with Two-Sided Demand and Preemptive Offers to Dissipate Monopoly Rent: Lessons for High-Technology Industries from the Antitrust Division’s Approval of the XM-Sirius Satellite Radio Merger*, 4 J. COMPETITION L. & ECON. 697, 711 (2008) (discussing the reluctance of SDARS consumers to switch to alternative audio entertainment sources, demonstrating the low demand elasticity of satellite radio).

75. *See id.* at 751 (concluding that “[w]ithout significant sensitivity to a change in price, the SDARS monopoly provider would be free to raise SDARS prices to monopoly levels”).

76. *See, e.g.*, *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 379–80 (1956) (inquiring into whether the relevant product market for the sale of cellophane was simply the market for cellophane or the broader market urged by the defendants, consisting of “flexible packaging material[s]”); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997) (describing the FTC’s characterization of the relevant product market in a merger between Staples and Office Depot as “the sale of consumable office supplies through office superstores,” versus the merging parties’ broader definition of “simply the overall sale of office products”).

77. *See* Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc., XM Satellite Radio Holdings Inc., Transferor, & Sirius Satellite Radio, Transferee, MB Docket 07-57, at 25 (Mar. 20, 2007) [hereinafter Consolidated Application], *available at* <http://www.nab.org/xert/corpcomm/newsletters/radioweek/2007/040207/XMSiriusconsolidatedapplication.pdf> (citing a recent Arbitron study finding that satellite radio accounts for 3.4% of all radio listening).

78. *See* DOJ Press Release, *supra* note 56 (finding that the evidence adduced during its investigation “did not support defining a market limited to the two satellite radio firms, and similarly did not establish that the combined firm could profitably sustain an increased price to satellite radio consumers”).

that no commenter provided sufficient evidence of market definition and that the Commission could not perform its own analysis because subscription rates had largely remained stable since satellite radio's inception.<sup>79</sup> Instead, the FCC performed its antitrust analysis by assuming that satellite radio was the relevant product market.<sup>80</sup> Nevertheless, the evidence cited in the Merger Order is enough to definitively conclude that the FCC's assumption was correct.

The Commission stated that the only price increase for satellite radio service occurred in 2005 when XM increased its subscription rate from \$9.99 to \$12.95 to match its competitor's price.<sup>81</sup> But after this increase, XM saw subscriber growth in the following two quarters.<sup>82</sup> This continued growth despite a thirty percent price increase "underscores the low elasticity of demand faced by SDARS providers."<sup>83</sup> In other words, if the newly merged Sirius XM increased subscription rates, they would likely *not* lose customers to terrestrial radio, iPods, or other forms of audio entertainment.<sup>84</sup> This demonstrates the unique quality of satellite radio, which offers commercial-free music, talk shows immune to indecency laws, and nationwide sports coverage.<sup>85</sup> Moreover, evidence showed that satellite radio listeners are also heavy listeners of AM/FM radio, suggesting that these services are complements rather than

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79. See Merger Order, 23 F.C.C.R. 12348, 12368–69 (2008) (highlighting commenters' disagreement on demand elasticity analysis methodology and assumptions).

80. See *id.* at 12373 (noting that this "assumption[] will tend to *overestimate* any anticompetitive effects" and that this assumption is necessary in order to avoid "inadvertently approv[ing] a merger that is not in the public interest").

81. See *id.* at 12369 (stating further that Sirius had kept its monthly prices the same since launching satellite radio service in 2002).

82. See Sidak & Singer, *supra* note 74, at 711–12 (explaining that in the third and fourth quarters of 2005, XM subscribership increased by thirteen percent and twenty percent respectively).

83. *Id.*

84. *But see* Economic Analysis of the Competitive Effects of the Sirius-XM Merger, XM Satellite Radio Holdings Inc., Transferor, & Sirius Satellite Radio Inc. Transferee, MB Docket No. 07-57, at 10 (FCC July 24, 2007) (Sirius-XM Joint Opposition Exhibit A, prepared by Steven A. Salop, et al.), *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519560251](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519560251) [hereinafter Salop Analysis] (arguing that any price increase instituted by Sirius or XM would reduce satellite radio subscribership because consumers would switch to other forms of audio entertainment).

85. See Expert Declaration of J. Gregory Sidak Concerning the Competitive Consequences of the Proposed Merger of Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc., at 13, 25–26 (FCC Mar. 16, 2007), *available at* [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519008261](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519008261) [hereinafter Sidak Declaration] (discussing the differences between terrestrial and satellite radio and arguing that these differences create market division between the two services and therefore should not be considered in the same relevant product market for antitrust purposes).

substitutes and therefore should not be included in the same product market.<sup>86</sup>

Even if there is competition in a broader audio entertainment market, satellite radio could be a submarket of the larger market: “[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes.”<sup>87</sup> Indicia of a submarket include “industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.”<sup>88</sup>

These factors support the conclusion that satellite radio could be a viable submarket because of the many unique qualities that distinguish it from other forms of media.<sup>89</sup> Sirius and XM readily boast about their services, describing satellite radio as exceptionally distinct from terrestrial radio.<sup>90</sup> The satellite radio companies’ comments attest to “their own belief that consumers view SDARS as significantly different from terrestrial radio.”<sup>91</sup>

Furthermore, satellite radio pricing history indicates that neither Sirius nor XM considered other forms of audio entertainment as substitutes.<sup>92</sup> Since the advent of satellite radio, many other audio

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86. See Merger Order, 23 F.C.C.R. at 12370 n.150 (noting an Arbitron study finding satellite radio listeners consumed more hours of AM/FM radio than satellite radio per week). Complements are items that are generally used in conjunction with one another and therefore not included in the same product market. See *Little Rock Cardiology Clinic, P.A. v. Baptist Health*, 573 F. Supp. 2d 1125, 1143 (E.D. Ark. 2008) (explaining that complements are “goods that are most efficiently made or used together,” such as “gasoline and automobiles”). By contrast, substitutes are items that are viewed as interchangeable by consumers and will always be included in the relevant product market. See *id.* (defining substitutes as “goods that can replace one another and thus ‘compete’ for the user’s purchase”).

87. See *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075 (D.D.C. 1997) (describing the Supreme Court’s recognition of submarkets, which “in themselves, constitute product markets for antitrust purposes”). If, upon examination of the submarket, there is a reasonable probability that the merger will substantially lessen competition in that submarket, the merger is proscribed. *Id.*

88. *Id.* (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

89. See *supra* note 85 and accompanying text (discussing the unique qualities of satellite radio).

90. See *Sidak & Singer*, *supra* note 74, at 722 (noting that both Sirius and XM issued press releases distinguishing satellite radio as commercial-free, ubiquitous radio with a large programming selection).

91. *Id.* at 723.

92. See *infra* notes 94–96 and accompanying text (discussing the lack of new initiatives or price movement by Sirius and XM in response to new innovations in audio entertainment services). The court in *Staples* considered the lack of price responsiveness by Staples and Office Depot to non-superstore office suppliers as evidence that the two retailers competed in a distinct submarket consisting of only office supply superstores. *Staples*, 970 F. Supp. at 1075–77. Specifically, internal documents suggested that Staples and Office Depot lowered their prices only in

entertainment devices have been placed on the market.<sup>93</sup> Yet, prices for satellite radio have remained nearly constant.<sup>94</sup> This suggests that neither Sirius nor XM adopted new initiatives in response to iPods, HD radio, Internet radio, or the vast array of other services both companies sought to include in the relevant product market.<sup>95</sup> If such devices were true substitutes for satellite radio, their presence in the marketplace would have prompted both companies to offer new services or reduce prices to entice customers.<sup>96</sup>

In response to this assertion, Sirius and XM offered the FCC a competitive response timeline, which highlighted advances in other audio entertainment fields, such as new iPod innovations, alongside of new offerings announced by both Sirius and XM for a three-year period.<sup>97</sup> The Applicants offered this chart as evidence that satellite radio innovated in response to offerings from other audio entertainment services, thereby supporting the broader relevant product market.<sup>98</sup> While this chart did exhibit many innovations

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response to another office superstore entering the market and maintained higher prices in markets when competing only with non-superstore chains. *Id.*

93. See, e.g., First Report and Order, Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, 17 F.C.C.R. 19990, 19990 (2002) (establishing procedures for the introduction of HD radio); Press Release, Apple Inc., Apple Presents iPod (Oct. 23, 2001), <http://www.apple.com/pr/library/2001/oct/23ipod.html> (announcing the introduction of the iPod).

94. See *supra* note 81 and accompanying text (discussing the one change in subscription rates for both companies since the inception of satellite radio).

95. See *The XM-Sirius Merger: Monopoly or Competition from New Technologies: Hearing Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. 58 (2007) (statement of David A. Balto, antitrust attorney) (noting that the lack of impact other audio entertainment advances on Sirius or XM “strongly suggest[ed] that satellite radio d[id] not innovate . . . in response to the product offerings of different music listening formats, and thus these formats [were] not part of the same product market”).

96. *Id.* Balto noted that much of the information regarding both Sirius’ and XM’s response to other forms of audio entertainment were contained in company files not available to the public. *Id.* However, after a review of public information, Balto concluded that neither satellite radio provider adopted “a single new initiative” in response to advances from other music alternatives. *Id.*

97. Competitive Response Timeline, XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc. Transferee, MB Docket No. 07-57 (FCC July 24, 2007) (Sirius XM Joint Opposition Exhibit E), *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519560252](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519560252) (charting Sirius, XM, terrestrial broadcaster, wireless provider, iPod/MP3, and internet radio innovations from 2004–2007 but failing to illustrate how specific satellite radio innovations responded to those of alternate audio entertainment providers).

98. See Joint Opposition to Petitions to Deny and Reply Comments of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., XM Satellite Radio Holdings Inc., Transferor, & Sirius Satellite Radio Inc., Transferee, No. 07-57, at 42 (July 24, 2007), *available at* [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519560249](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519560249) (arguing that “satellite radio providers, MP3 manufacturers, terrestrial radio providers, Internet radio providers, and mobile service providers all have introduced new services and

created by other forms of audio entertainment and satellite radio, it suffers from the *post hoc, ergo propter hoc* fallacy—the chart is inconclusive as to whether satellite radio innovated in response to these other forms of audio entertainment or whether Sirius and XM innovated in response to competition from each other.<sup>99</sup>

Not only does this evidence unequivocally suggest that satellite radio is the relevant product market, but the FCC previously stated that satellite radio would primarily compete in its own market.<sup>100</sup> In the Satellite Radio Order, the FCC explicitly stated that “[o]ther audio delivery media are not, of course, perfect substitutes for satellite DARS.”<sup>101</sup> This statement remains true today. Even with the advent of the iPod, satellite radio is still not a perfect substitute for portable music players.<sup>102</sup> Satellite radio is geared toward in-car use, while the iPod is more practical in other settings.<sup>103</sup> Because these

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products in response to other players in this dynamic and constantly evolving audio entertainment marketplace”).

99. For example, on March 9, 2006, Sirius announced that it would carry every game of the 2006 NCAA basketball tournament, while five days later Apple announced that it would offer condensed versions of these same games available for download on iTunes. Competitive Response Timeline, *supra* note 97, at 3. However, Sirius’ announcement came on the heels of a series of XM announcements, including the addition of coverage of the World Baseball Classic and Big East baseball and basketball games, and signing Oprah Winfrey to a fifty-five-million-dollar deal. *Id.* Within a matter of days, Sirius made the above announcement regarding the NCAA tournament in addition to debuting ESPN Deportes and Fox News Talk channel on its lineup. *Id.* These new channel options announced by both providers could have been in response to competition with each other, separate and apart from any considerations regarding new offerings by iPods or terrestrial radio. Conversely, other forms of media entertainment could be innovating in response to satellite radio, rather than satellite radio innovating in response to other forms of audio entertainment. Without solving this “chicken and the egg” conundrum, it is clear that the chart does not conclusively prove that Sirius or XM innovated in response to other forms of media. *See supra* notes 95–96 (discussing the lack of new innovations created by either Sirius or XM in response to innovations by other forms of audio entertainment).

100. Satellite Radio Order, 12 F.C.C.R. 5754, 5786 (1997) (emphasizing the FCC’s goal of creating a competitive satellite radio market despite a spectrum constraint that limited the FCC to offering only two licenses).

101. *See id.* (noting that other audio entertainment and satellite radio “differ with respect to the programming menu . . . , the sound quality, the cost of equipment, and the presence or absence of a subscription fee”).

102. *But see* Joel D. Corriero, Comment, *Satellite Radio Monopoly*, 33 DEL. J. CORP. L. 423, 436–37 (2008) (arguing that because satellite radio is available on portable devices and through Internet feed it competes with iPods and Internet radio and therefore should be considered in the broader “mobile audio entertainment services” market).

103. *See* Sidak & Singer, *supra* note 74, at 726–27 (discussing the differences between SDARS and iPods and noting that “docking technology for iPods in automobiles is cumbersome and prone to interference”). *But see* Kason D. Kerr, Comment, *A Judicial Analysis of the Satellite Radio Merger: Creation of the Next Led Zeppelin or Simple Garage Band?*, 45 HOUS. L. REV. 1345, 1374 (2008) (arguing that portable music players should be included in the relevant product market because of “the increasing ease of integrating iPods and MP3 players into car stereo systems”).

forms of audio entertainment are not substitutes, they should not be included in the same relevant market for antitrust purposes.

While the FCC took none of the foregoing evidence into consideration, it nonetheless assumed, under a “worst-case scenario,”<sup>104</sup> that the relevant product market consisted only of satellite radio.<sup>105</sup> Although this is a step toward a more thorough competitive analysis, the statement of FCC Commissioner McDowell, noting that XM and Sirius constituted only five percent of the audio marketplace,<sup>106</sup> calls into question whether the majority actually considered this narrow market definition in its decision.

*B. The Dramatic Increase in Post-Merger Market Concentration Suggested the Merger Would Produce Anticompetitive Effects*

If the FCC does indeed consider satellite radio as the relevant product market, it is difficult to understand why the merger was approved in light of the significant increase in market concentration. Market concentration can provide a barometer to indicate the likely potential competitive effects of a merger.<sup>107</sup> To measure market concentration, the *Merger Guidelines* employ the Herfindahl-Hirschman Index (HHI), which is calculated by adding the squares of the individual market shares of all the participants on a scale from zero to ten thousand.<sup>108</sup> The *Merger Guidelines* articulate benchmarks for determining the degrees of market concentration.<sup>109</sup> A post-merger HHI of below 1000 is considered “unconcentrated.”<sup>110</sup> A post-merger HHI between 1000 and 1800 is considered “moderately concentrated,” while any measure above 1800 is deemed “highly concentrated.”<sup>111</sup> When a post-merger HHI exceeds 1800 and

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104. Merger Order, 23 F.C.C.R. 12348, 12373 (2008).

105. See *supra* note 80 and accompanying text (finding that the FCC’s reason to proceed under such a narrow market definition was an effort to overestimate the anticompetitive effects of the merger to ensure that the transaction would be in the public interest).

106. See Merger Order, 23 F.C.C.R. at 12456 (statement of Comm’r McDowell) (discussing the increase in competition in the audio marketplace).

107. See MERGER GUIDELINES, *supra* note 18, at 15 (explaining that “[m]arket concentration is a function of the number of firms in a market and their respective market shares”).

108. See *id.* at 15–16 (requiring the agency to examine “both the post-merger market concentration and the increase in concentration resulting from the merger”).

109. See *id.* at 16–17 (laying out the general standards for determining the likely competitive effect of a merger and articulating the expected agency response at each level).

110. *Id.* at 16.

111. See *id.* (noting that a post-merger increase of less than 100 points in a moderately concentrated market is unlikely to have any anticompetitive effect).

the HHI increase is more than 100 points above the pre-merger level, the DOJ and FTC presume the merger is “likely to create or enhance market power or facilitate its exercise.”<sup>112</sup>

If the relevant product market is satellite radio, then the post-merger HHI would be 10,000—a perfect monopoly.<sup>113</sup> Indeed, the FCC conceded that this merger resulted in an HHI of 10,000 and an increase of 4992.<sup>114</sup> But even if the relevant market were broader, as both Applicants urged, the post-merger HHI would increase “by more than 4,000 points in all but five local radio markets” if the relevant market included HD signals, and would increase over “3,000 points in all but thirteen local radio markets” if the relevant market included HD and terrestrial signals.<sup>115</sup>

Such elevated levels of post-merger HHI are a strong indicator that the merged firm will acquire and exercise market power.<sup>116</sup> In fact, the FCC recognized that these increased levels of market concentration in an already highly concentrated market support the reasonable inference that the “merged firm would charge prices that are higher than those charged by Applicants pre-merger.”<sup>117</sup>

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112. *Id.* The presumption of anticompetitive effects may be overcome by entry considerations, extraordinary efficiency justifications, or the failing firm defense. *Id.* at 18, 25–27, 30–33.

113. See Sidak & Singer, *supra* note 74, at 734 (concluding that a post-merger HHI of 10,000 constitutes a merger to monopoly).

114. See Merger Order, 23 F.C.C.R. 12348, 12374 (2008) (recognizing that with these post-merger HHI figures “[i]t is widely accepted that, absent offsetting economies, a monopolist will charge a higher price than firms in a competitive market, including a duopoly”). These HHI figures were calculated under the FCC’s worst-case scenario, where the relevant product market included only satellite radio. *Id.* at 12372–73. Because the FCC was proceeding with its competitive analysis under this assumption, the Commission did not calculate the post-merger HHI assuming a broader market, such as the audio entertainment market urged by the Applicants. *Id.*

115. Sidak Declaration, *supra* note 85, at 33–34. *But see* Salop Analysis, *supra* note 84, at 48–52 (arguing that the post-merger market concentration falls within the safe harbor levels of the Merger Guidelines). However, the FCC redacted Salop’s post-merger HHI figures in the version of his Declaration made available for public inspection. *Id.*

116. See MERGER GUIDELINES, *supra* note 18, at 16 (indicating that the DOJ and FTC presume such high post-merger HHI levels engender or expand the merged company’s market power). Recent antitrust decisions have condemned mergers where the post-merger HHI reached 10,000 or even 4775. See *infra* notes 119–120 and accompanying text.

117. Merger Order, 23 F.C.C.R. at 12374–75.

*C. The Merger Order Did Not Cure the Competitive Problems of the Transaction Because it Failed to Regulate Indirect Price Manipulation and Implicit Pricing Elements in Satellite Radio*

Although Commissioner Adelstein noted in his dissenting statement that the merging parties failed to provide “sufficient evidence to perform a structural market analysis that would allow” the FCC to “predict the likelihood of competitive harm,”<sup>118</sup> high HHI figures establish a rebuttable presumption that the merger will lessen competition in the relevant market.<sup>119</sup> For example, a district court concluded that the potential merger of Staples and Office Depot, the result of which would be a post-merger HHI of 10,000, presented a “‘reasonable probability’ that the proposed merger would have an anti-competitive effect.”<sup>120</sup> Similarly, the U.S. Court of Appeals for the District of Columbia held that the FTC had established a prima facie case of anticompetitive effects where the post-merger HHI would have been 4775.<sup>121</sup>

Despite the fact that the Merger Order admitted that the merged entity might have “an increased incentive and ability”<sup>122</sup> to raise prices, the Commission nonetheless determined that the merger would not result in anticompetitive effects because the parties’ voluntary commitments to limit such results would mitigate any competitive harms.<sup>123</sup> While the FCC relied on the conditions imposed on the merged entity to reverse these potential competitive concerns,<sup>124</sup> those conditions have left gaping holes through which Sirius XM can extort monopoly profits.

Foremost, the FCC relied on the three-year price cap to ameliorate any possible harm to consumers by significant price hikes.<sup>125</sup> Under

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118. *Id.* at 12446 (Adelstein, Comm’r, dissenting).

119. *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 716 (D.C. Cir. 2001) (noting that the 510 point increase in HHI created a presumption that the merger would lessen competition, establishing the FTC’s prima facie case that the merger was anticompetitive).

120. *See* FTC v. Staples, Inc., 970 F. Supp. 1066, 1082 (D.D.C. 1997) (finding that the high HHI figures demonstrated a likelihood of success on the merits).

121. *Heinz*, 246 F.3d at 716.

122. Merger Order, 23 F.C.C.R. at 12375.

123. *See id.* (concluding that “even assuming the worst-case scenario . . . [the] grant of the application is in the public interest”).

124. *See id.* at 12393 (finding that “[a]bsent Applicants’ voluntary commitments and other conditions, the harms outweigh the potential benefits; the presence of these voluntary commitments mitigates the harms and ensures that the benefits are realized”).

125. *See id.* at 12394–96 (rejecting commenters’ arguments that the “merged companies cannot be counted on to comply with any conditions, that pricing conditions are of dubious legality, and that approving the merger would contravene the Commission’s preference for intramodal competition”).

the agreement, the parties committed to maintain the price of retail subscription rates for thirty-six months after the consummation of the merger.<sup>126</sup> But the Commission overlooked alternate pricing elements where Sirius XM may be able to achieve monopoly profits.<sup>127</sup> Subscription rates are only one component of the price of satellite radio.<sup>128</sup> For example, the merged firm could increase prices for equipment subsidies, ancillary services, activation fees, termination fees and transfer fees.<sup>129</sup> In fact, under Sirius XM's new Terms and Conditions issued after the merger, the company reserved the right to charge nine additional fees, all of which are "subject to change without notice" to customers.<sup>130</sup> Those fees include a fifteen dollar "activation fee," a seventy-five dollar "cancellation fee," a seventy-five dollar "transfer fee," a twenty dollar "returned payment fee," a five dollar "package change fee," and a five dollar "a la carte channel change fee."<sup>131</sup>

Moreover, the Merger Order explicitly applied the price cap to an enumerated list of subscription packages,<sup>132</sup> leaving nothing to prevent the merged firm from creating new programming packages and charging a monopoly price for the new subscription.<sup>133</sup> Additionally, Sirius XM could increase advertising and lower the quality of its programming as another way to exercise market

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126. *See id.* at 12394 (emphasizing the three-year cap but granting the combined company the right to pass on new recording or publishing royalty fees after a year).

127. *See id.* at 12446–47 (Adelstein, Comm'r, dissenting) (arguing that even with the price cap, "the merged entity could evade or undermine this consumer protection in several significant respects").

128. *See* Sidak & Singer, *supra* note 74, at 751 (arguing that, in addition to subscription rates, satellite radio providers also compete with respect to programming options, commercials, and equipment prices, and that in order to completely protect consumers, the FCC should have secured conditions regarding these other elements).

129. *See* Merger Order, 23 F.C.C.R. at 12446–47 (Adelstein, Comm'r, dissenting) (adding that the price cap similarly fails to prevent the merged entity from raising prices by "reducing content quality").

130. Sirius Satellite Radio, Terms and Conditions §§ F(3), (8) (Aug. 1, 2009), <http://www.sirius.com/serviceterms>.

131. *Id.*

132. Merger Order, 23 F.C.C.R. at 12394. The three-year price cap applies only to the basic subscription package, a la carte programming, the "best of both" package, the "mostly music" and "news, sports, and talk" package, and the "discounted family-friendly programming package." *Id.*

133. *See id.* at 12446–47 (Adelstein, Comm'r, dissenting) (arguing that the merged firm "could evade the price cap by siphoning off programming from the capped packages to new and presumably uncapped packages"). Not only was this theory plausible, but by the time of the merger application, both providers adopted service clauses to facilitate such a practice. *Id.* at 12447. The policies stated, "programming options . . . are subject to individual channel changes in the ordinary course of business." *Id.*

power.<sup>134</sup> Without having to compete for customers, the merged entity is free to lower the quality of its product without fear of losing subscribers.<sup>135</sup> In fact, Sirius CEO Mel Karmazin stated such a plan to investors, declaring that the post-merger “advertising line is going to contribute significantly in the future”<sup>136</sup> towards the average revenue per user.<sup>137</sup> Even if Sirius XM employs *any* of the foregoing schemes, it will still be in compliance with the Merger Order. Thus, the effectiveness of the price cap in protecting consumers from monopoly price hikes is questionable.

Six months before the price cap expires, the FCC will review the conditions to determine if price regulation is still needed.<sup>138</sup> But, as Commissioner Copps stated, this is “little more than a fig leaf.”<sup>139</sup> The FCC is passing the buck to a future Commission that will be in no better position to judge the need for price regulation than the current Commission.<sup>140</sup> Because of the price cap, neither econometric analysis nor price variation—the lack of which prevents the current Commission from defining the relevant market—will be available in three years.<sup>141</sup> The FCC will have no better vantage point

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134. See Sidak & Singer, *supra* note 74, at 736 (arguing that while “it is difficult to quantify the exact welfare loss associated with increased advertising time, it is reasonable to conclude that any increase in advertising time would generate significant welfare losses”).

135. See Merger Order, 23 F.C.C.R. at 12447 (Adelstein, Comm’r, dissenting) (“Consumers might as well prepare for a barrage of new commercials, because now they will have nowhere else to turn if they want satellite radio service.”).

136. Investor Presentation, Sirius Satellite Radio, Inc. & XM Satellite Radio Holdings, Inc. 16 (SEC Feb. 20, 2007), <http://www.sec.gov/Archives/edgar/data/908937/000095012307002469/y30604be425.htm>.

137. See *id.* at 6, 16 (stating that “the merged company will be significantly more attractive to large national advertisers” because both providers will have significantly more “reach” collectively). *But see* Corriero, *supra* note 102, at 445 (arguing that the advertising revenues will allow the merged entity to lower monthly subscription rates, thereby creating a public interest benefit).

138. See Merger Order, 23 F.C.C.R. at 12395 (noting that the reevaluation is necessary because the Commission cannot predict the competitive landscape in three years).

139. *Id.* at 12443 n.6 (Copps, Comm’r, dissenting) (criticizing the majority for implying “that it is not leaving consumers completely unprotected in 2011, while leaving all of the difficult decisions to a future Commission”).

140. See *id.* (noting that the future “Commission will scarcely appreciate the Hobson’s choice we are bestowing on them: let the price caps expire in the face of a monopoly provider or impose a new system of rate regulation on an industry that has never had one in the past”).

141. See *id.* at 12368–69, 12374 (explaining that the lack of price elasticity data, due to the largely static price of Sirius and XM subscriptions up to that point, prevented the Commission from predicting likely post-merger price increases). The Commission places great weight on the fact that this condition is a price cap, not a price freeze. *Id.* at 12395. By capping the subscription rates instead of freezing the rates, Sirius XM will still have the option to lower prices during the three-year period. *Id.* However, Sirius XM is facing financial distress, including more than \$1.1 billion in debt that is due in 2009, so it is unlikely that the merged entity would lower prices.

to predict the likely anticompetitive effects of this merger during the next three years while satellite radio conforms to a regulated monopoly.<sup>142</sup>

Not only is the thirty-six month duration of the price cap arbitrary, but a significant loophole created by the Commission makes the condition altogether meaningless. The Merger Order caveats this price cap with a pass-through provision, which allows the merged firm to pass through “statutory or contractual programming costs to the consumer one year after the merger is complete.”<sup>143</sup> Commissioner Adelstein criticized this provision as a benefit to the Applicants and a detriment to consumers: “While the genesis of this exception is left unexplained, the winners and losers are apparent.”<sup>144</sup> While touting the victory of the price cap, the majority quietly slipped in the pass-through provision, which makes any debate over the efficacy of the price cap a moot discussion.<sup>145</sup> In a subtle maneuver of misdirection, the FCC gift-wrapped an anniversary present to Sirius XM: monopoly profits. As dissenting Commissioner Copps stated, to the extent the merged firm takes advantage of this loophole, “even the three-year price controls could prove illusory.”<sup>146</sup>

*D. High Barriers to Entry in the Satellite Radio Market Increased the Anticompetitive Effects of the Merger*

The possibility that another firm will enter the relevant market may rebut the presumption of anticompetitive effects shown through high market concentration.<sup>147</sup> Entry into the relevant market must be “easy,” meaning that it is “timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the

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Cecilia Kang, *Sirius XM Having Trouble Paying Off Debt*, WASH. POST, Sep. 10, 2008, at D4.

142. Commissioner Adelstein advocated for a longer duration of the price cap that would correlate to the expected entry of a competitor who could sufficiently enter the market and constrain prices. Merger Order, 23 F.C.C.R. at 12448 (Adelstein, Comm’r, dissenting). Additionally, he offered an alternative option that would provide for the presumptive renewal of the price cap unless the merged entity could show that the restriction is no longer necessary. *Id.*

143. *Id.* at 12448; *see also id.* at 12394 (majority opinion) (allowing, specifically, Sirius XM to pass through cost increases “incurred since the filing of the merger application as a result of statutorily or contractually required payments to the music, recording and publishing industries for the performances of musical works and sound recordings or for device recording fees”).

144. *Id.* at 12448 (Adelstein, Comm’r, dissenting).

145. The three Commissioners in the majority give themselves plenty of praise for procuring the price cap but fail not only to reconcile the pass-through provision, but to mention it at all in their statements. *See id.* at 12442, 12451–56 (statements of Chairman Martin, and Comm’rs Tate and McDowell).

146. *Id.* at 12443 n.7 (Copps, Comm’r, dissenting).

147. MERGER GUIDELINES, *supra* note 18, at 24.

competitive effects of concern.”<sup>148</sup> Without significant entry barriers, it is unlikely that a firm will be able to maintain supra-competitive pricing for any period of time.<sup>149</sup> In other words, if another satellite radio provider were able to enter the market, Sirius XM would not be able to profitably charge a monopoly price without losing a significant number of customers to the new provider.

However, the anticompetitive effects of a merger can be further exacerbated by high barriers to market entry.<sup>150</sup> Because of the dynamics of SDARS, significant barriers to entry exist in the satellite radio market, furthering the competitive problems of the Sirius XM merger.<sup>151</sup> The FCC admitted in the Merger Order that entry by a new satellite radio provider is “unlikely to be sufficiently timely to defeat any attempted price increase.”<sup>152</sup> Under the *Merger Guidelines*, entry is timely if it can be accomplished within two years.<sup>153</sup> The difficulties faced by XM and Sirius in becoming operational imply that new entry would not successfully compel any price discipline in the next two years.<sup>154</sup> Both SDARS providers were established in the early 1990s, but neither actually offered satellite radio until September 2001.<sup>155</sup> Both companies had to overcome significant fixed costs, including acquiring spectrum and programming, to become operational.<sup>156</sup>

But even if a firm possessed the magnitude of resources necessary to enter the satellite radio market and constrain prices, the FCC

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148. *Id.* at 25–26; *see also supra* note 36 and accompanying text (describing the MERGER GUIDELINES definition of “timely, likely, and sufficient” entry).

149. *See* *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1086 (D.D.C. 1997) (asserting that a showing of significant barriers to entry are a critical part of the rebuttal analysis because without such barriers it is unlikely that a company could maintain anticompetitive prices for any substantial length of time).

150. *Cf.* *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 717 (D.C. Cir. 2001) (noting that low entry barriers can significantly alter the anticompetitive effects of a merger because the threat of outside entry will deter the remaining entities from colluding or exercising market power).

151. *See Competition and the Future of Digital Music: Hearing Before the Antitrust Task Force of the H. Comm. on the Judiciary*, 110th Cong. 69, 86 (2007) [hereinafter *Sirius XM Hearing*] (statement of Charles E. Biggio, antitrust attorney) (discussing the regulatory barriers to entry and the additional barriers that would exist even if the FCC provided additional licenses because a new firm would not be able to enter the market within two years due to the expense and time commitment required to launch a new satellite radio company).

152. Merger Order, 23 F.C.C.R. 12348, 12373 (2008).

153. *See* MERGER GUIDELINES, *supra* note 18, at 27 (noting that only entry “achieved within two years from initial planning to significant market impact” will be considered).

154. Sidak Declaration, *supra* note 115, at 35–36.

155. *Id.* at 35.

156. *See* Merger Order, 23 F.C.C.R. at 12373 n.162 (noting that the fixed costs tallied over \$5 billion to date and that a new satellite alone could cost more than \$300 million).

created an insurmountable barrier: it transferred all spectrum available for SDARS to one company and is “unaware of any appropriate, unencumbered spectrum” that would be available for SDARS in the future.<sup>157</sup> Therefore, as the Commission readily admits, there is *no possibility* that an entrant could enter the market and reverse the anticompetitive pricing imposed by the merged entity.<sup>158</sup> Thus, the anticompetitive effects of the merger are further exacerbated by the high barriers to market entry.

*E. The Efficiencies and Conditions Generated by the Merger Were Insufficient to Overcome the Probable Anticompetitive Effects*

After assessing the seemingly insurmountable amount of evidence of anticompetitive effects, the FCC reached the obvious conclusion: the Sirius XM merger is a merger to monopoly.<sup>159</sup> Under this assumption, “it is reasonable to predict that, absent exceptional countervailing efficiencies, prices are likely to be higher after the merger than before.”<sup>160</sup> However, mergers can produce efficiencies that may overcome the anticompetitive concerns of the transaction.<sup>161</sup> Under the *Merger Guidelines*, these efficiencies must be cognizable, meaning that they must be merger-specific, verifiable, and must not arise from anticompetitive reductions in output or service.<sup>162</sup> However, in a highly concentrated market where the potential adverse competitive effects of a merger are likely to be high,

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157. *Id.* at 12373.

158. *Id.* at 12373–74 (recognizing that there were no uncommitted entrants who might participate in the market); see MERGER GUIDELINES, *supra* note 18, at 10–11 (dividing entry into two categories: committed and uncommitted, and discussing the differences between and examples of committed and uncommitted entrants). A committed entrant must expend significant sunk costs to enter and exit the market. *Id.* at 10. The committed entrant will reverse the anticompetitive effects of a merger if the committed entry is timely, likely, and sufficient. *Id.* By contrast, an uncommitted entrant will not incur significant sunk costs and can enter the market quickly to counteract supra-competitive pricing. *Id.* at 11. If uncommitted entry is possible in a particular market, whether or not such an entrant exists, the DOJ and FTC consider that entry in the competitive analysis and that entry is thought to counteract the anticompetitive effects. *Id.*

159. See Merger Order, 23 F.C.C.R. at 12374 (concluding that under the worst-case assumptions, the post-merger HHI is 10,000 and therefore the proposed merger is a merger to monopoly).

160. *Id.*

161. See *supra* note 37 and accompanying text (discussing the requirements for efficiencies to be considered in the competitive analysis).

162. See MERGER GUIDELINES, *supra* note 18, at 30 (explaining that efficiencies are merger-specific if 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 of having comparable anticompetitive effects”). The *Merger Guidelines* put the onus on the merging firms to substantiate efficiency claims. *Id.* at 31. Those claims will be rejected if they are “vague or speculative or otherwise cannot be verified by reasonable means.” *Id.*

“extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”<sup>163</sup> Even if the conditions imposed on Sirius XM were enough to overcome these lofty standards, the *Merger Guidelines* state that “efficiencies almost never justify a merger to monopoly.”<sup>164</sup>

Yet, the FCC exercised its unstructured antitrust analysis to ignore the *Merger Guidelines*’ counsel. As Commissioner Adelstein argued, granting this merger under the assumed “‘worst-case’ scenario” required the imposition of “significant conditions, proportional to the significant public interest harm” in order to overcome the competitive concerns.<sup>165</sup> Adelstein further asserted that “[r]egrettably, the majority’s acceptance of the Applicants’ ‘voluntary commitments’ fails to meet this professed prophylactic public interest standard because of gaping loopholes in them.”<sup>166</sup> In fact, this practice of solving competitive problems through the imposition of conditions was criticized by former FCC Chairman Michael Powell, who stated that the Commission “places harms on one side of a scale and then collects and places any hodgepodge of conditions—no matter how ill-suited to remedying the identified infirmities—on the other side of the scale.”<sup>167</sup>

To begin with, not only does the price cap allow the merged firm to secure monopoly profits through pricing elements other than subscription rates,<sup>168</sup> but antitrust precedent has never supported a price-freeze as part of a consent decree.<sup>169</sup> By monitoring prices for satellite radio, the FCC puts itself in the position of regulating a

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163. *Id.* at 32; *see also id.* at 31–32 (requiring greater cognizable efficiencies in the presence of greater potential adverse competitive effects, as measured by high post-merger HHI figures).

164. *Id.* at 32.

165. Merger Order, 23 F.C.C.R. at 12446 (Adelstein, Comm’r, dissenting).

166. *Id.*

167. Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L.J. 167, 168–69 (2008) (quoting Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor & SBC Comm., Inc., Transferee, 14 F.C.C.R. 14712, 15197 (1999) (statement of Comm’r Powell, concurring in part and dissenting in part)).

168. *See supra* notes 125–134 and accompanying text (discussing fee increases, new subscription packages, and decreased programming quality as loopholes for the merged entity to extort monopoly profits without violating the Merger Order).

169. *See Sidak Declaration, supra* note 115, at 56 (noting that the FTC and DOJ have expressly stated that they are not in the business of regulating prices). Sidak cites *Butterworth Health Corp. v. FTC*, 946 F. Supp. 1285 (W.D. Mich. 1996), and *FTC v. Cardinal Health*, 12 F. Supp. 2d 34 (D.D.C. 1998), as cases supporting the proposition that prices are best governed by market competition, not by price caps or price regulation. *Id.* at 57. “The rule to be drawn from *Butterworth* and *Cardinal Health* is that courts and enforcement agencies are not regulators.” *Id.* at 58.

monopoly instead of letting market forces ensure competition.<sup>170</sup> This heavy regulation is antithetical to the FCC's stated preference for free market competition.<sup>171</sup> In fact, past FCC decisions have rejected price regulation as a sufficient and satisfactory condition to overcome the anticompetitive effects of a merger.<sup>172</sup>

Next, the Commission once again compelled SDARS providers to market an interoperable radio.<sup>173</sup> Commissioner Adelstein pointed out that this "voluntary commitment" is the equivalent of "closing the barn door after the cows got out."<sup>174</sup> Eleven years earlier, the Satellite Radio Order commanded satellite radio providers to market an interoperable device in order to reduce switching costs and increase competition between the two companies.<sup>175</sup> No such device was ever marketed.<sup>176</sup> Now that the duopoly has become a monopoly, the reasons for requiring an interoperable radio have become obsolete.<sup>177</sup> In addition to being redundant and an example of one of the many blatant disregards for Commission mandates by the two

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170. The FCC's authority to regulate prices for satellite radio is questionable because Congress has not delegated such power to the agency. *See* Sidak & Singer, *supra* note 74, at 749–50 (concluding that the FCC has never "permitted an industry to consolidate into a rate-regulated monopoly when the market structure has been unregulated and supported two competitors"). By comparison, the antitrust agencies generally avoid rate-regulation and courts have historically struck down attempts to do so. *See id.* at 748–49 (citing as examples the failed attempts by the Interstate Commerce Commission to regulate the price of railways).

171. *See* Hearing Designation Order, Application of EchoStar Commc'ns Corp., General Motors Corp., and Hughes Elecs. Corp., Transferors & EchoStar Commc'ns Corp., Transferee, 17 F.C.C.R. 20559, 20629 (2002) [hereinafter EchoStar Order] (rejecting the applicants' national pricing plan, which would replace competition with regulatory oversight, thereby conflicting "with the goal of allowing competition to replace regulation, that both Congress and this Commission have long sought to achieve").

172. *See id.* at 20628–29 (finding the national pricing plan inadequate to cure competitive harms, in part because the merged entity could discriminate against customers by charging different prices for equipment or installation, reducing offers to customers for free months of programming, changing the number of channels available in certain programming packages, and providing different levels of customer service).

173. *See* Merger Order, 23 F.C.C.R. 12348, 12404 (2008) (stating that the merged entity must offer an interoperable receiver for sale within nine months of the consummation of the merger).

174. *Id.* at 12449 (Adelstein, Comm'r, dissenting) (arguing that this condition cannot be deemed merger-specific).

175. Satellite Radio Order, 12 F.C.C.R. 5754, 5795–96 (1997).

176. *See* Merger Order, 23 F.C.C.R. at 12398 (offering the free-rider problem as the reason why an interoperable device was never marketed: neither company had the incentive to subsidize an interoperable receiver "because of uncertainty whether the subsidy would be recouped since the purchaser might not subscribe to that particular Applicant's service").

177. *See id.* at 12449 (Adelstein, Comm'r, dissenting) (arguing that the point of the interoperability requirement was to enforce the policy before the merger to ensure competition between the two providers).

companies, this condition is not merger-specific.<sup>178</sup> Sirius and XM could have manufactured an interoperable device prior to the merger, and indeed both companies stated that they had already done so.<sup>179</sup> Therefore, the interoperable radio efficiency could be achieved absent the merger, thus failing to qualify as a merger-specific efficiency.<sup>180</sup>

Similarly, the a la carte programming plan fails to satisfy the merger-specific requirement. Both companies could offer a la carte programming options without the merger by allowing customers to choose which stations they would like to receive with their subscription, instead of a one-size-fits-all menu.<sup>181</sup> Nevertheless, the majority accepted the Applicants' argument that without the merger, neither provider could afford to offer a la carte programming.<sup>182</sup> Without further discussion, the Commission found that, absent the merger, neither company would be likely to offer this option, and therefore deemed the commitment merger-specific.<sup>183</sup>

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178. In order to qualify interoperable radios as a merger-specific efficiency, Sirius and XM would have to claim that the only way either provider could manufacture or market the devices would be through a merger. *See supra* note 162 and accompanying text (explaining that in order to qualify for a merger-specific efficiency the company must show that the only way to achieve the desired outcome is through a merger). Any efficiency achievable absent a merger is not merger-specific. *Id.*

179. Merger Order, 23 F.C.C.R. at 12397–405. Sirius and XM filed letters with the Commission in October of 2000 and again in March of 2005 regarding their compliance with the interoperability requirement imposed by the 1997 Satellite Radio Order. *Id.* at 12397–403. In the 2000 letter, both companies stated that because they did not control the manufacturing, distribution, or sale of the receivers, they had to rely on manufacturers, automakers, and retailers to market the interoperable radios. *Id.* at 12397. By 2005, both providers indicated that they had designed an interoperable radio and thereby complied with the Commission's mandate. *Id.* They emphasized that the availability of these receivers to consumers would “depend in large part on factors outside of the control of either XM or Sirius.” *Id.* Therefore, both parties argued that—regardless of the availability to end-users—Sirius and XM had met the FCC's interoperability requirement because that requirement only mandated “that an interoperable receiver be designed, but does not require the production, distribution, marketing or sale of such a receiver, which [Sirius and XM] claim is outside of their control.” *See* Merger Order, 23 F.C.C.R. at 12398–99. The FCC accepted this argument, finding that the companies' interpretation of the requirement was not “unreasonable.” *Id.* at 123401.

180. The majority admitted that because receiver interoperability was a requirement in the 1997 Satellite Radio Order, this efficiency was not merger-specific. *Id.* at 12390.

181. *Cf. id.* at 12448 (Adelstein, Comm'r, dissenting) (protesting that the majority “accepts the Applicants' unjustified assertion that such [a la carte] packages could not be offered absent a merger and summarily finds that such packages present merger-specific benefits”).

182. *See id.* at 12389 (majority opinion) (accepting the a la carte offerings as merger-specific because, as the Applicants argued, neither company could offer such programming “without the synergies and economies of scale created by this merger”).

183. *Id.*

While the FCC imposed other conditions that have the potential to mitigate, albeit not overcome, the anticompetitive effects of the merger,<sup>184</sup> the past conduct of both Sirius and XM exemplifies their disregard for Commission rules and brings into question whether the merged firm will comply with these conditions. Both companies have a long history of noncompliance with Commission mandates.<sup>185</sup> In addition to ignoring the interoperable receiver requirement, both providers have blatantly and intentionally violated rules regarding the use of terrestrial repeaters.<sup>186</sup>

In 2006, the Commission discovered such violations and began an investigation of both companies' conduct.<sup>187</sup> The infringements were not innocent or minor in severity: XM was intentionally operating 479 unauthorized repeaters.<sup>188</sup> In responding to the consent decrees issued pursuant to these infractions, Commissioner Adelstein noted that "[i]n light of such unprecedented violations, it is stunning that the Commission was poised to approve the merger of XM and Sirius before resolving these enforcement matters."<sup>189</sup> In fact, before FCC Commissioner Tate—the swing vote in the merger—would approve the deal she insisted that the two companies bring themselves into compliance.<sup>190</sup> On the same day that the FCC executed the Merger

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184. *See id.* at 12440 app. C (listing the timeline of commitments agreed to by the parties).

185. *See id.* at 12424 (conceding that the long history of the Applicants misconduct with regard to the "manufacture, importation, marketing and distribution of modulators . . . and operation of numerous terrestrial repeaters [was] troubling").

186. *See* Order, XM Radio, Inc., 23 F.C.C.R. 12325 (2008) [hereinafter XM Consent Decree], *and* Order, Sirius Satellite Radio, Inc., 23 F.C.C.R. 12301 (2008) [hereinafter Sirius Consent Decree] (adopting a consent decree between the FCC and XM Radio and Sirius Satellite Radio, respectively, to end the Commission's investigations into whether either provider's radio receivers were in compliance with Section 302(b) of the Communications Act and whether either provider constructed and operated terrestrial repeaters without the authorization of the FCC, in violation of section 25.120 of the Commission's rules).

187. *See* XM Consent Decree, 23 F.C.C.R. at 12328–29 (stating that in September of 2006, XM voluntarily disclosed its violations, which amounted to 711 violations associated with 460 repeaters); Sirius Consent Decree, 23 F.C.C.R. at 12305 (stating that the Commission initiated an investigation into Sirius' use of terrestrial repeaters after Sirius informed the FCC that 11 repeaters had been operating at variance from their authorization specifications and had been subsequently turned off).

188. XM Consent Decree, 23 F.C.C.R. at 12329. *See id.* at 123331 (noting that XM agreed to a voluntary contribution of \$17,394,375 for its violations). Sirius also paid \$2,200,000 to the Treasury for its violations. Sirius Consent Decree, 23 F.C.C.R. at 12308.

189. XM Consent Decree, 23 F.C.C.R. at 12346 (statement of Comm'r Adelstein).

190. *See id.* at 12347 (statement of Comm'r Tate) (stating that it was "imperative to resolve these outstanding enforcement issues before moving to consideration of this merger"). Commissioner Tate's statement issued after the Merger Order suggested that her motive for casting the deciding vote in favor of the deal was the "sluggish economic outlook," which would only worsen "with a negative regulatory decision" that could harm Sirius and XM. Merger Order, 23 F.C.C.R. at 12451 (statement of

Order, it also issued two consent decrees requiring Sirius' and XM's compliance and their payment of over \$19 million in fines for violating Commission rules.<sup>191</sup>

### III. AN ECHO FROM THE PAST: DISTINGUISHING A SATELLITE TELEVISION MERGER

#### A. *The FCC's Previous Review of the EchoStar Merger Shared Many Similarities with Sirius XM*

While the FCC fumbled the competitive analysis of the Sirius XM merger, previous FCC decisions have not been so casual with antitrust principles. In 2002, the FCC denied the application to transfer control of satellite television licenses, which would have combined the two major direct broadcast satellite (DBS) providers in the United States, EchoStar and DirecTV.<sup>192</sup> In a unanimous decision, the Commission determined that the merger would harm competition in the relevant market, where significant barriers to entry existed and no cognizable efficiencies outweighed the competitive harms.<sup>193</sup> The decision reflected the Commission's preference for deregulation and marketplace competition.<sup>194</sup> Yet, six years later the FCC reversed this preference in favor of a regulated monopoly in satellite radio.

The similarities between the EchoStar merger and the Sirius XM merger are many. With such strong parallels, it seems to offend any notion of consistency for the latter merger to reach a different outcome.<sup>195</sup> Yet even with two Commissioners in common between

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Comm'r Tate). In concluding that the merger would serve the public interest, Commissioner Tate admitted in the same sentence that she remained concerned about potential ramifications of the merger. *Id.*

191. *See supra* notes 186–188 and accompanying text (discussing the specific repeater violations and the fines imposed for those infractions).

192. *See* EchoStar Order, 17 F.C.C.R. 20559, 20561 (2002) (explaining that the proposed deal consisted of two transactions: one involved a merger between General Motors and Hughes Electronics, of which DirecTV is a wholly owned subsidiary, and the second involved Hughes and EchoStar).

193. *See id.* at 20665 (designating the matter for hearing before an administrative law judge to determine whether the merger was anticompetitive and whether, on balance, the transaction would serve the public interest).

194. *See id.* at 20663 (concluding that the national pricing plan proposed by the Applicants was inconsistent with the goals of the Commission and the Communications Act, "all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare . . . with free market competition").

195. "To allow the proposed merger creating a satellite DARS monopoly would thus be inconsistent with the FCC's order establishing this service, with Commission precedent in the satellite television context, and with its long-standing policy of establishing spectrum-based commercial services with no fewer than two participants

the 2002 and 2008 Commissions,<sup>196</sup> the FCC ignored the precedent set in the EchoStar decision and tailored its analysis to facilitate the approval of the merger between Sirius and XM.

The first commonality stems from the market definition, or lack thereof. Both merger orders failed to define the relevant market because the FCC in both instances was not presented with enough evidence to reach a determination.<sup>197</sup> But in the face of a lack of evidence, the two Commissions diverged in their respective reviews. The EchoStar Order proceeded in its antitrust analysis by assuming a broader market that included more than just satellite television, whereas the Sirius XM Merger Order presumed a smaller market consisting of only satellite radio.<sup>198</sup> By assuming a broader, applicant-friendly market in the EchoStar Order, the FCC minimized the chances that the transaction would pose competitive problems; yet it still found enough evidence of potential anticompetitive effects to decline the merger's approval.<sup>199</sup> It would seem to follow then that the more narrow market assumed in the Sirius XM merger would certainly justify its rejection.

*B. Both Mergers Significantly Increased the Market Concentration in Already Highly Concentrated Markets*

Not only was the EchoStar market definition more conducive to approving the merger, but the levels of post-merger market

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per service.” See *Sirius XM Hearing*, *supra* note 151, at 7 (statement of David K. Rehr, president and CEO of the National Association of Broadcasters).

196. Commissioner Michael Copps, a Democrat, has served since May 2001. FCC Commissioner Michael Copps, <http://www.fcc.gov/commissioners/copps/> (last visited Sept. 28, 2009). Now former Commission Chairman Kevin Martin, a Republican, joined the Commission in July 2001 and was appointed Chairman by President George W. Bush in March 2005. *FCC Chairman Kevin Martin to Join Aspen Institute*, USATODAY.COM, Jan. 15, 2009, [http://www.usatoday.com/tech/news/2009-01-15-fcc-martin\\_N.htm](http://www.usatoday.com/tech/news/2009-01-15-fcc-martin_N.htm). Chairman Martin resigned his post at the FCC when President Barack Obama took office. *Id.*

197. See EchoStar Order, 17 F.C.C.R. at 20609 (concluding that further econometric demand analysis or other evidence of substitutability was needed to conclusively resolve the issue of market definition); see also *supra* notes 79–80 and accompanying text (discussing the FCC's failure to conclusively define the relevant product market in the Sirius XM merger and proceeding under the assumption that the market included only the two satellite radio providers).

198. See EchoStar Order, 17 F.C.C.R. at 20609 (assuming the relevant product market was all multichannel video programming distribution (“MVPD”) services as the Applicants urged, even though the evidence strongly suggested that the relevant market was smaller). By contrast, the Merger Order assumed the product market was more narrowly defined and included only SDARS providers. See Merger Order, 23 F.C.C.R. 12348, 12373 (2008).

199. See EchoStar Order, 17 F.C.C.R. at 20609 (concluding that “even adopting the Applicants market definition, we [the FCC] find . . . that the structural characteristics suggest that the merger is likely to result in significant anticompetitive effects”).

concentration were also elevated enough to raise competitive concerns, similar to those in the Sirius XM combination.<sup>200</sup> The 2002 Commission concluded that the mean post-merger HHI for all television markets was 6043 with a mean increase in HHI of 1163.<sup>201</sup> The FCC also determined that by removing cable television providers from the relevant market and including only satellite television providers—EchoStar and DirecTV—the post-merger HHI was 10,000.<sup>202</sup> Similar to satellite radio, only two firms served the satellite television market, the combination of which created a perfect monopoly.<sup>203</sup>

Furthermore, the increase in spectrum concentration in the EchoStar deal was nearly indistinguishable from that of the Sirius XM merger.<sup>204</sup> The EchoStar merger would have resulted in the merged entity acquiring all of the available capacity for satellite television providers.<sup>205</sup> Because of this significant acquisition of spectrum, the Commission found the EchoStar merger “to be inconsistent with well-established federal pro-competitive spectrum policies.”<sup>206</sup> Yet, the FCC ignored these competitive preferences in analyzing the Sirius XM merger and allowed one entity to control one hundred percent of all satellite radio spectrum—more spectrum than AM and FM bands combined.<sup>207</sup> While the 2002 Commission found that “the public interest is better served by the existence of a diversity of service

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200. *Compare* Merger Order, 23 F.C.C.R. at 12374 (finding the post-merger HHI of the Sirius XM merger to be 10,000), *with* EchoStar Order, 17 F.C.C.R. at 20615 (finding the mean post-merger HHI for all markets to be 6043, and, when including only satellite television in the relevant product market, a post-merger HHI of 10,000).

201. EchoStar Order, 17 F.C.C.R. at 20615.

202. *Id.* at 20615–16.

203. The Commission commented on the state of competition in the satellite television market if the Echostar merger were approved:

The record before us irrefutably demonstrates that the proposed transaction would eliminate a current viable competitor from every market in the country, whether those markets are currently served by cable systems or are markets in which no cable systems exist, at best resulting in a merger to duopoly, and at worst a merger to monopoly.

EchoStar Order, 17 F.C.C.R. at 20662.

204. *Compare* Merger Order, 23 F.C.C.R. at 12353, 12355 (stating that of the 25 MHz of spectrum available for satellite radio in the 2320–2345 MHz band, Sirius held 12.5 MHz of spectrum in the 2320–2332.5 band, while XM held the remaining 12.5 MHz in 2332.5–2345 band), *with* EchoStar Order, 17 F.C.C.R. at 20598 (expressing doubt that the public interest would be served by this merger because it would convey all of the current allotted U.S. direct broadcast satellite spectrum to one company).

205. EchoStar Order, 17 F.C.C.R. at 20586.

206. *Id.*

207. Merger Order, 23 F.C.C.R. at 12373; *id.* at 12445 (Adelstein, Comm’r, dissenting).

providers wherever possible,”<sup>208</sup> the 2008 Commission departed from this competitive policy to confer a spectrum monopoly on Sirius XM.

*C. Significant Barriers to Entry Existed in Both Markets*

Additionally, the barriers to entry exhibited in the Sirius XM merger resembled those in the EchoStar deal. The FCC found high barriers to entry in 2002, such that no satellite television provider could enter the market within two years, thereby failing to qualify as timely entry.<sup>209</sup> Therefore, not only did the Commission find significant concentration in an already highly concentrated market, it also found that potential entry into that market would not defeat any attempt by the merged entity to raise prices above the competitive level.<sup>210</sup>

The 2002 Commission reviewing the EchoStar merger found high entry barriers even though two additional companies possessed licenses that could have eventually been used to provide competing DBS service.<sup>211</sup> By contrast, no such potential entrant existed in the satellite radio market.<sup>212</sup> The total absence of any entrant further demonstrates the increased anticompetitive potential of the Sirius XM merger compared to the EchoStar transaction and raises more questions as to why the former was approved when the latter was denied.

*D. Although Similar Efficiencies and Conditions Were Agreed to by the Merging Parties, the EchoStar Order and Merger Order Reached Different Outcomes*

In light of the potential significant anticompetitive effects of both transactions, each merger would have to exhibit exceptional countervailing efficiencies and impose significant conditions to

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208. EchoStar Order, 17 F.C.C.R. at 20603.

209. *Id.* at 20616.

210. *See id.* at 20619 (concluding that because entry is not likely and because the market is already highly concentrated, there is a substantial likelihood that the merger would adversely affect competition).

211. Because of significant obstacles in launching and establishing that service, the FCC found that entry would not be timely, likely or sufficient to defeat anticompetitive behavior by the merged firm. EchoStar Order, 17 F.C.C.R. at 20617–18. The potential entrants, Rainbow DBS and SES Americom, faced considerable obstacles to enter the market and become viable competitors within two years. *Id.* Furthermore, the FCC also noted that “there are no additional full-CONUS slots available for the provision of high-power DBS service.” *Id.* at 20617.

212. *See* Merger Order, 23 F.C.C.R. at 12373–74 (concluding that no committed or uncommitted entrant should be considered a market participant for the purpose of competitive analysis).

overcome the competitive concerns.<sup>213</sup> Although the FCC determined that Sirius and XM met this challenge, similar efficiencies and conditions fell short of this hurdle six years earlier.<sup>214</sup> The EchoStar deal cited many efficiencies and conditions stemming from the merger.<sup>215</sup> Foremost was the parties' national pricing plan, which would purportedly constrain the merged firm from charging supra-competitive prices for satellite television.<sup>216</sup> The Commission found that this was an inadequate solution to the competitive problems facing the merger.<sup>217</sup> Specifically, the FCC found that the merged firm could institute price discrimination in terms of service quality, programming content, or by increasing equipment and installation prices.<sup>218</sup> Additionally, the Commission concluded that the amount of regulatory oversight required to ensure that the merged firm was abiding by this national pricing plan was too burdensome on Commission resources and conflicted with long-standing policies of replacing regulation with competition.<sup>219</sup>

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213. *Compare* Merger Order, 23 F.C.C.R. at 12374 (concluding that in light of the significant potential anticompetitive effects of the merger, Sirius and XM would have to present "exceptional countervailing efficiencies" in order to overcome the presumption of harm), *with* EchoStar Order, 17 F.C.C.R. at 20604, 20619 (concluding that the proposed merger is likely to have an adverse competitive effect on competition and, when faced with such potential harm, the parties must "demonstrate that there exist countervailing, extraordinarily large, cognizable, and non-speculative efficiencies that are likely to result from the merger").

214. Most prominently, the 2002 Commission rejected a price regulation condition whereas the 2008 Commission championed a similar commitment in the price cap. *See* Merger Order, 23 F.C.C.R. at 12443-44 (Copps, Comm'r, dissenting) (questioning the FCC's decision to suddenly support a regulated monopoly when it specifically declined such an option in the EchoStar decision).

215. The EchoStar Applicants asserted efficiencies and conditions such as a national pricing plan, new service options (including the addition of local stations), significant cost savings that would be passed on to consumers, and a reduction of redundant channels to increase spectrum efficiency. EchoStar Order, 17 F.C.C.R. at 20626-53. Similarly, the Sirius XM Applicants proposed a price cap and argued that the merger would create new service options (such as a "best of both" package and a la carte channel plans), generate cost savings for consumers, and increase programming options by eliminating redundant channels. *See* Consolidated Application, *supra* note 77, at 9-13 (discussing the "synergies resulting from the merger" and the ensuing "substantial, merger-specific, public interest benefits").

216. One of the concerns stemming from the EchoStar merger was that the merged entity would be able to charge monopoly prices in geographic markets that were not served by cable. EchoStar Order, 17 F.C.C.R. at 20626-29. In other words, the new firm would not have to compete with cable in those markets and would be free to charge a supra-competitive price. *Id.* The national pricing plan proposed by the parties would have set a uniform price for all satellite television rates in order to prevent price discrimination in markets where satellite television would own a monopoly. *Id.*

217. *Id.* at 20628.

218. *Id.*

219. *Id.* at 20629.

Yet, the FCC accepted Sirius XM's proposed price cap, with all of its exceptions and caveats, as a significant check on the merged entity's power,<sup>220</sup> opting in favor of a regulated monopoly rather than a competitive marketplace.<sup>221</sup> Commissioner Copps further discussed the baffling shift to embrace a regulated monopoly: "I thought that debate was settled—as did a unanimous Commission in 2002 when it declined to approve the proposed merger between DirecTV and EchoStar."<sup>222</sup>

*E. Applicants in Both Mergers Had Checkered Histories of Complying with FCC Rules, Calling into Question Whether they Would Comply with Post-Merger Conditions*

While the current Commission placed great weight on the conditions and efficiencies generated from the Sirius XM merger, Sirius' and XM's individual histories of noncompliance and willful disregard for Commission rules calls into question Sirius XM's commitment to complying with the FCC's directives.<sup>223</sup> The parties to the EchoStar merger had a similarly checkered history of failing to comply with FCC mandates.<sup>224</sup> Of course, the difference was that the 2002 Commission took into account this defiant behavior, while the 2008 Commission administered a \$19 million slap on the wrist and granted the merger anyway.<sup>225</sup>

Specifically, EchoStar had a history of failing to comply with "must-carry" channel obligations, which the Commission took into account "in assessing the likelihood that potential beneficial conduct w[ould] occur in the absence of private economic incentives."<sup>226</sup> In fact, Commissioner (later Chairman) Kevin Martin dissented in

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220. See *supra* Part II.E (discussing the FCC's acceptance of the efficiencies created by the Sirius XM merger because the conditions imposed on the merged firm would be sufficient to mitigate any competitive harm).

221. See Merger Order, 23 F.C.C.R. 12348, 12443 (2008) (Copps, Comm'r, dissenting) (arguing that Commission precedent counseled against supporting regulated monopolies as evidenced by the EchoStar merger decision).

222. *Id.*

223. See *supra* notes 185–191 and accompanying text (discussing Sirius and XM's failures to comply with Commission rules regarding terrestrial repeaters and their subsequent penalty payments of over nineteen million dollars as a result).

224. EchoStar Order, 17 F.C.C.R. at 20576–79 (outlining EchoStar's history of avoiding its must-carry obligations).

225. Compare *infra* note 226 and accompanying text (discussing the FCC's decision to consider the EchoStar Applicants' history of noncompliance), with Merger Order, 23 F.C.C.R. at 12425–26 (concluding that the consent decree sufficiently resolved both Applicants' compliance problems and dismissing the National Association of Broadcasters' contention that the long history of misconduct by the companies is probative of their future noncompliance).

226. EchoStar Order, 17 F.C.C.R. at 20579.

part from the EchoStar decision because the majority failed to designate the issue of past compliance for hearing before the ALJ.<sup>227</sup> Martin argued that EchoStar's violation of FCC rules was "indicative of the applicant's future behavior."<sup>228</sup> Yet six years later, Martin approved the satellite radio merger and ignored the past violations of the Applicants, concluding that both companies' payment pursuant to their respective consent decrees was sufficient to resolve their misconduct and had no predictive value regarding their future behavior.<sup>229</sup> Unfortunately, Martin's newfound proclivity toward forgiveness offers no solace to consumers.

*F. The FCC's Attempt to Distinguish the Two Mergers Failed to Explain Why EchoStar Was Denied and Sirius XM Approved*

With many glaring resemblances, the Merger Order would seem incomplete without some mention of the EchoStar merger and at least some attempt to distinguish the two deals. Although the Commission addressed this issue, its analysis for differentiating the two mergers was less than clear.<sup>230</sup> The Merger Order began distinguishing the two transactions by stating that the EchoStar applicants competed against one another and that without such competition, prices were likely to rise.<sup>231</sup> While this fact is of course obvious and true, it fails to set apart the instant case. Sirius and XM were also competitors.<sup>232</sup> In fact, the entire Merger Order was premised on this idea because it defined the market as satellite radio.<sup>233</sup> Clearly, any attempt to distinguish these mergers on the

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227. See Statement of Comm'r Kevin Martin Regarding Application of EchoStar Commc'ns Corp., Gen. Motors Corp., and Hughes Elecs. Corp. (Transferors) and EchoStar Commc'ns Corp. (Transferee), CS Docket No. 01-348, at 6 (Oct. 9, 2002), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-02-284A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-284A2.pdf) ("EchoStar's ongoing violation of its must-carry obligations is critical to our [the FCC's] evaluation of the pending merger.").

228. *Id.*

229. Merger Order, 23 F.C.C.R. at 12442 (statement of Chairman Martin).

230. See *id.* at 12376-77 (majority opinion) (conceding only "surface similarities" between the two mergers and emphasizing the voluntary conditions agreed to by the Sirius XM Applicants, which were allegedly not present in the EchoStar merger). But see *supra* note 215 and accompanying text (citing the conditions agreed to by the EchoStar Applicants including a national pricing plan, which is similar in effect to the price cap agreed to by Sirius and XM in that both conditions constrained the merging parties from implementing price increases).

231. Merger Order, 23 F.C.C.R. at 12376.

232. *Id.* at 12445 (Adelstein, Comm'r, dissenting) (stating that the "marketplace competition" between Sirius and XM before the merger "undoubtedly contributed to their cutting edge appeal"); see also Salop Analysis, *supra* note 84, at 10 (noting that Sirius and XM also compete with others).

233. See *supra* notes 78-80 and accompanying text (discussing the FCC's inability to conclusively define the relevant product market and instead proceed under a

basis of competition between the two Applicants, or a lack thereof, was simply a fallacy.<sup>234</sup>

The Merger Order then explained that because price variation evidence was not available for satellite radio, it was not possible to define the market “or determine [the] likely impacts on price, and conducting a hearing would not change this basic fact.”<sup>235</sup> But the EchoStar Order never conclusively defined the market either, and the FCC similarly assumed a relevant product market in order to proceed with its competitive analysis.<sup>236</sup> Furthermore, the EchoStar Order designated the market definition issue for a hearing before an ALJ to cure this evidentiary defect.<sup>237</sup> Such a hearing for the Sirius XM merger would have allowed for further discovery to determine the possible anticompetitive effects of the merger and enabled the Commission to properly define the relevant market from evidence adduced at that hearing.<sup>238</sup>

Finally, in a bold assertion, the Merger Order stated that the parties to the EchoStar merger “made no such commitments to mitigate potential harms or to create benefits that would outweigh the potential harms,” whereas Sirius XM did offer such voluntary commitments.<sup>239</sup> But the EchoStar Order committed twenty-three pages to discussing efficiencies and conditions resulting from the proposed merger.<sup>240</sup> In fact, the 2002 Commission designated the

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“‘worst-case’ scenario” assuming that the market consisted only of satellite radio providers).

234. To suggest that Sirius and XM did not compete against one another prior to the merger is questionable. *See* Merger Order, 23 F.C.C.R. at 12445 (Adelstein, Comm’r, dissenting) (discussing how the competition between Sirius and XM “improved the quality of programming and benefited consumers”). In fact, the two companies were initially granted spectrum on the premise that licensing two providers would ensure competition in satellite radio. *See supra* notes 51–53 and accompanying text (detailing the origin of satellite radio and the implementation of the FCC’s rule against single ownership of all satellite radio spectrum to ensure competition in that market). *But see* Corriero, *supra* note 102, at 446–47 (arguing that because satellite radio is primarily used in both automobiles and homes, other audio entertainment mediums which provide multiple accessibility options should be included in the relevant market).

235. Merger Order, 23 F.C.C.R. at 12376.

236. *See supra* notes 197–198 and accompanying text (describing the FCC’s failure to define the market in the EchoStar Order and its decision to proceed under the assumption that the market was broader than satellite television service).

237. EchoStar Order, 17 F.C.C.R. 20559, 20665 (2002).

238. *See id.* at 20665–66 (designating the unresolved issues for hearing, specifically market definition, public interest harms and benefits, and whether the merger serves the public interest).

239. Merger Order, 23 F.C.C.R. at 12376.

240. *See* EchoStar Order, 17 F.C.C.R. at 20630–53 (discussing the efficiencies asserted by the Applicants, including more efficient use of spectrum, local-into-local programming, increased competition in the cable television market, and increased nationwide broadband services).

issue of efficiencies for hearing to determine “whether the cost savings and other benefits claimed by [the] Applicants are non-speculative, credible and transaction-specific and are likely to flow through to the public.”<sup>241</sup> Considering this contradictory and misleading attempt to distinguish the EchoStar merger from the Sirius XM transaction, the Commission would have appeared more credible by ignoring the issue altogether.

#### IV. THE SOLUTION: HANDCUFF THE FCC’S ANTITRUST AUTHORITY OR LOCK IT UP AND THROW AWAY THE KEY?

Because the Commission was unable to conclude that the EchoStar merger would have served the public interest, it unanimously voted to designate the matter for hearing before an ALJ.<sup>242</sup> Section 309(e) of the Communications Act provides that if the FCC is unable to make a finding that the public interest would be served by granting a license transfer application, then “it shall formally designate the application for hearing.”<sup>243</sup> Based on the ample evidence of potential anticompetitive effects of the Sirius XM merger and questionable efficiency justifications, the FCC should have sought recourse pursuant to this section of the Communications Act.<sup>244</sup> When faced with future merger reviews presenting similar substantial anticompetitive risks, the FCC should be more open to seeking a hearing rather than attempting to mend the many holes on a sinking ship.<sup>245</sup>

The hearing would be similar to a challenge before a federal appeals court under section 7 of the Clayton Act,<sup>246</sup> except that the burden of proof would be on the merging firms to demonstrate that

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241. *Id.* at 20666.

242. *See supra* note 193 and accompanying text (describing the FCC’s decision to designate the EchoStar merger for hearing because it could not adduce enough evidence to show that the merger was in the public interest).

243. 47 U.S.C. § 309(e).

244. Commissioner Adelstein dissented in the Merger Order because he sought the same outcome. *See* Merger Order, 23 F.C.C.R. at 12450 (Adelstein, Comm’r, dissenting) (“Because the proposed transaction, as structured, has not been shown to serve the public interest, the merger application should be designated for hearing.”).

245. The FCC rarely opts to designate a merger review for hearing, instead relying on its power to impose enough conditions on the merged entity to combat any competitive problems posed by the transaction. *See supra* note 29 and accompanying text (discussing the FCC’s preference for imposing conditions rather than enjoining harmful mergers in federal court); *see also infra* note 249 (finding that the FCC has only designated one merger review for hearing in the last thirty years).

246. *See supra* note 21 and accompanying text (setting forth standards under which mergers are analyzed under the Clayton Act).

the merger does not harm competition.<sup>247</sup> While the FCC's original determination would be given no deference by the ALJ, the matter would return to the Commission for a final adjudication, taking into consideration the determination by the ALJ.<sup>248</sup> However, when the FCC seeks to designate a merger for hearing, the parties will most often either dissolve the proposed merger or restructure the transaction to address the competitive problems and begin the process again.<sup>249</sup> By contrast, once the Sirius XM merger had been consummated, private plaintiffs—either consumers or prospective satellite radio competitors—could file an action in a federal court of appeals seeking an injunction, but those cases are time-consuming, costly, and rarely produce plaintiff victories.<sup>250</sup>

If the Commission remains reluctant to take the necessary steps to ensure that it does not sanction harmful monopolies, Congress should review, and possibly retract, the Commission's antitrust authority. Indeed, as recently as 2000, Congress has several times attempted to severely limit or altogether eliminate the FCC's power to review mergers.<sup>251</sup> While these attempts were ultimately

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247. See Frankel, *supra* note 22, at 203 (noting that the review of FCC decisions consists of two levels: one level is the administrative hearing before an ALJ, while the second level is when the parties challenge the FCC's decision before a federal appeals court).

248. *Id.* at 202. The merging parties still have the burden of proof to affirmatively show that the merger satisfies the Commission's public interest standard. *Id.* Only after the FCC votes a second time—taking into account the ALJ's decision—can the merging parties appeal the decision to an Article III court. *Id.* at 202–03.

249. See *id.* at 202 n.147 (noting that the EchoStar merger was the only application designated for hearing in the last three decades). The EchoStar merger was later abandoned before a hearing could take place. *Id.*

250. See *id.* at 171 n.43. Consumers will often fail to challenge a merger because of the expense incurred by a single person to undergo the action unilaterally and because consumers face similar collective action difficulties when bringing a class action. *Id.* Competitors also face challenges in bringing an antitrust complaint against another competitor because the “antitrust injury” identified by the company is often actually the product of a procompetitive merger that resulted in lower prices. *Id.*

251. In 1999, Senator John McCain introduced S 1125 IS, a bill that would have effectively stripped the FCC of its merger review authority. *Summary of Bills Pertaining to Telecom Antitrust Merger Reviews in the 106th Congress*, TECH LAW JOURNAL.COM, <http://www.techlawjournal.com/cong106/atr/Default.htm> (last visited Sept. 28, 2009). McCain stated that the problem with the FCC's grant of authority is that “different agencies sequentially go over the same issues, and, after considerable delay, can make radically different decisions on the same sets of facts.” *Id.* The bill was referred to the Senate Commerce Committee, but no action was taken thereafter. *Id.* Similarly in 2000, Congressman Chip Pickering made a second attempt to limit the FCC's power by introducing H.R. 4019, which would have prohibited the FCC from denying a license transfer unless it would result in a violation of FCC rules. *Id.* The congressional findings indicated that the FCC's competitive review “often results in undue delay and introduces uncertainty into the marketplace because of the unpredictable standards for that review.” *Id.* The bill likewise never made it out of committee. *Id.*

unsuccessful, the efforts to strip antitrust authority from the Commission reflect congressional acknowledgement of flaws in the FCC's review process.<sup>252</sup>

In addition to concerns that the FCC's merger analysis is duplicative of the DOJ's review and thereby costly, commentators have further criticized the FCC's antitrust review as creating uncertainty and arbitrary enforcement.<sup>253</sup> This is mainly a result of the FCC's malleable "public interest" standard, which can be tailored to a wide range of outcomes.<sup>254</sup> Because the FCC is bound not by the *Merger Guidelines*, but by the public interest mandate, the Commission's determinations are easily manipulated by catering its elastic standard to serve its desired outcome.<sup>255</sup> Thus, many of the FCC's decisions reflect the ideologies of the party in power rather than consistent determinations governed by a long line of antitrust law.<sup>256</sup> The Supreme Court observed this very shortcoming, noting that the FCC's public interest standard "no doubt leaves wide discretion and calls for imaginative interpretation."<sup>257</sup> This becomes more problematic considering the enormous political and lobbying influences steering the Commission to the highest bidder.<sup>258</sup> While the FCC has long argued that its review of mergers serves a valuable purpose because of its expertise in the telecommunications

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252. Under the proposed Telecommunications Merger Review Act, the findings stated that the FCC exercises "broad authority over telecommunications industry mergers [and] overreaches its intended statutory authority and its substantive expertise and produces delay and inconsistency in its decisions." Telecommunications Merger Review Act, H.R. 3186, 106th Cong. (1999).

253. See Weiss & Stern, *supra* note 23, at 205 (explaining that uncertainty arises because it is difficult to predict which agency will act and which standard the agency will use to evaluate the merger).

254. See Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. TELECOMM. & HIGH TECH. L. 19, 59-60 (2009) ("This malleability in the FCC's governing statute unmoors the Commission from time-tested economic analysis and exacerbates its susceptibility to expedient political compromise.").

255. *Id.*; see also *infra* note 257 and accompanying text (highlighting the FCC's broad discretion in merger analysis).

256. See Nuechterlein, *supra* note 254, at 60-61 (discussing the political influence tainting FCC decisions in contrast to the politically-insulated review of the DOJ and FTC, both of which take their direction from "judge-made antitrust precedent").

257. *FCC v. RCA Comm'ns, Inc.*, 346 U.S. 86, 90 (1953); see also *Prometheus Radio Project v. FCC*, 373 F.3d 372, 433 (3d Cir. 2004) (criticizing the FCC for using certain propositions in the MERGER GUIDELINES while ignoring others and ordering the FCC to justify this divergence on remand).

258. See Nuechterlein, *supra* note 254, at 59 (discussing the fear that the FCC can be "captured" by industry interest groups and that when presented with a competition issue the FCC often asks: "[H]ow can we reach a compromise that will expose us to the least political damage?").

industry,<sup>259</sup> the DOJ is well equipped to supplant that expertise, as it retains telecommunications experts of its own.<sup>260</sup>

Although the DOJ's Antitrust Division similarly declined to challenge the Sirius XM merger, many commentators have suggested that the DOJ adopted a laissez-faire attitude toward merger enforcement during the George W. Bush administration.<sup>261</sup> In fact, the rate of challenged mergers during the Bush tenure was less than half the normal average during previous administrations.<sup>262</sup> Therefore, although the DOJ failed to challenge the Sirius XM merger, this lax enforcement policy suggests that the DOJ's actions may have been different under an administration that did not promote such a hands-off approach to merger review.<sup>263</sup>

While merger enforcement is expected to be revived under the Obama administration,<sup>264</sup> the FCC is still vulnerable to unpredictable

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259. See *Telecommunications Act of 2000: Hearing Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 17-31 (2000) (statement of William E. Kennard, Chairman of the FCC) (defending the FCC's vital role in merger review as an agency with significant expertise in the telecommunications area and arguing that any congressional limitations placed upon the Commission's review process would eliminate or severely curtail public involvement in the review process).

260. The DOJ's Antitrust Division includes a Telecommunications and Media Enforcement Section "responsible for enforcing antitrust laws in the communications and media industries" as well as participating in proceedings before the FCC. Department of Justice, Antitrust Division, Sections and Offices, <http://www.usdoj.gov/atr/sections.htm#tms> (last visited Sept. 28, 2009).

261. See Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008, at 29-30 (suggesting that antitrust "decision makers appear overly willing to accept defense arguments about entry, expansion, and efficiencies, while downplaying the loss of competition inherent in the proposed merger"); see also John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Econometric Estimation*, ANTITRUST, Summer 2008, at 43 (asserting that an analysis of 200 mergers reviewed during the Bush administration revealed that the DOJ was twenty four percent less likely to challenge a transaction than during the Clinton administration).

262. See Baker & Shapiro, *supra* note 261, at 30 (finding that during the years 1982-2007 merger enforcement actions averaged 0.9% and that that rate "bottomed out at only 0.4 percent" during the second term of the Reagan administration and during both terms of the Bush administration).

263. See *id.* at 32 (agreeing with the characterization of the Whirlpool/Maytag merger as a "close deal" which was approved by the DOJ in 2006 and noting that the merger "would have had a hard time" getting through the DOJ ten years ago"). In addition, Baker and Shapiro questioned the DOJ's decision not to challenge the Sirius XM merger because it failed to acknowledge that once Sirius' and XM's exclusive dealing agreements with auto manufacturers end, consumers will no longer benefit from competition between the two providers, which had reduced the price car buyers paid for satellite radio systems prior to the exclusive dealing agreements. *Id.* at n.17.

264. See generally Steven T. Taylor, *Antitrust Groups Get Ready and Get Set to Go as Enforcement Efforts Ramp Up*, OF COUNSEL, Feb. 2009, at 1 (discussing President Obama's plan to increase antitrust enforcement and the effect on law firms who saw a decline in Mergers and Acquisitions work during the Bush administration).

and improperly-influenced decisions so long as it remains free to conduct itself under the flexible public interest standard. If Congress cannot impose and restrict the Commission to more rigid standards for its competitive analysis, perhaps it is time to renew efforts to strip the FCC of its antitrust authority altogether.

#### CONCLUSION

While Sirius XM has thus far complied with certain conditions, including offering a joint programming package and a la carte channel options,<sup>265</sup> this compliance has not come without cost to consumers. Message boards, blogs, even the FCC's electronic comment filing system are heating up with angry subscribers who have seen the addition of commercials and subtraction of their favorite channels.<sup>266</sup> Many other listeners in the blogosphere share the same sentiments, accusing the new Sirius XM of changing the formerly dynamic and diverse stations into "[w]atered down, monotonous FM-like radio."<sup>267</sup>

But decreasing the quality of its programming is not the only consumer complaint. Taking full advantage of the loopholes in the price cap, Sirius XM has increased prices for subscribers with multiple accounts and now charges for online music, a service that was previously free to all subscribers.<sup>268</sup> Because the price cap is only applicable to a few programming packages, this latest price increase

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265. See Sirius Satellite Radio, Packages and Services, <http://www.sirius.com/packages> (last visited Sept. 28, 2009). Joint programming options include "Sirius Everything Plus the Best of XM" and "Sirius XM All-in-One" packages. *Id.*

266. See, e.g., Rock and Roll Daily, *Sirius and XM to Begin Music-Station Merger November 12th*, ROLLING STONE.COM, <http://www.rollingstone.com/rockdaily/index.php/2008/11/07/sirius-and-xm-to-begin-music-station-merge-november-12th> (Aug. 1, 2009, 13:14 EST) (reporting on the elimination of certain channels after the post-merger station consolidation and subscriber comments on the new channel lineup); *supra* note 13 (citing the FCC's Electronic Comment Filing System, which consists of over 15,000 comments filed by interested parties regarding the merger).

267. Ryan Saghir, *First Impressions: Now with Combined Channels, What Do You Think?*, ORBITCAST.COM, Nov. 12, 2008, <http://www.orbitcast.com/archives/first-impressions-now-with-combined-channels-what-do-you-think.html> (citing the posting of Ed Baxter on Nov. 12, 2008, commenting on the new channel lineup).

268. Beginning March 11, 2009, Sirius XM began to charge subscribers holding more than one account about nine dollars for each additional account, a two dollar increase from the pre-merger fee. Franklin Paul, *Sirius XM to Raise Some Prices as Debt Looms*, REUTERS, Jan. 21, 2009, <http://www.reuters.com/article/technologyNews/idUSTRE50K63V20090121>. Additionally, subscribers were charged about three dollars per month for the online music feed that was previously offered at no charge. *Id.* However, users were offered the option to escape these price hikes if they agreed to a long-term annual contract extension or paid up to five hundred dollars for a lifetime subscription. *Id.*

does not violate the Merger Order.<sup>269</sup> Similarly, the indirect price manipulation—decreasing the quality of satellite programming—falls outside the ambit of the Merger Order.<sup>270</sup> Clearly the FCC’s attempt to stack up enough conditions in order to prevent Sirius XM from exercising market power has not provided the intended protection to subscribers.

While the future implications of this merger for consumers could mean higher prices and lower quality of service, the impact on future FCC merger reviews is likely to be less dramatic.<sup>271</sup> The Obama administration and a Democratically controlled FCC will likely ramp up merger enforcement, which was significantly stalled during the previous administration, and therefore will give little credence to the Sirius XM merger decision.<sup>272</sup> Of course, there is the risk that the Sirius XM merger could set a precedent for future Commissions to adopt post-merger price regulation as a condition on merging parties and embrace regulated monopolies, instead of free market

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269. See *supra* note 132 and accompanying text (discussing the applicability of the price cap to an enumerated list of subscription packages).

270. See *supra* notes 133–135 and accompanying text (discussing alternative ways Sirius XM can exploit monopoly profits other than by increasing subscription rates).

271. With the election of President Obama, there will be a changing of the guard at the FCC and the antitrust agencies. The policies carried out by these agencies will likely reflect President Obama’s intent to “reinvigorate antitrust enforcement,” and therefore much of the Bush administration’s lax merger policies will not inform future merger reviews. See Michael Orey, *Obama Appoints Antitrust Chief*, BUSINESS WEEK, Jan. 22, 2009 (reporting on Christine Varney’s nomination to head the DOJ Antitrust Division, but questioning whether Obama’s antitrust revitalization will be able to thrive in a sluggish economy).

272. See *supra* note 264 and accompanying text (discussing probable changes in merger policy under the Obama administration). President Obama appointed Julius Genachowski, who was previously chief legal counsel to former FCC Chairman Reed Hundt, as the new Chairman of the FCC. See Cecilia Kang, *Campaign Aide Tapped to Head FCC*, WASH. POST, Mar. 4, 2009, at D3 (noting that Genachowski is expected to be confirmed without much opposition); John Poirier, *Genachowski Sworn in as U.S. FCC Chairman*, FORBES, June 29, 2009, <http://www.forbes.com/feeds/afx/2009/06/29/afx6599135.html>. It was under Hundt’s leadership at the FCC that the Commission established satellite radio and manifested the intention to keep the service competitive by prohibiting any mergers. See *Satellite Radio Order*, 12 F.C.C.R. 5754, 5823 (1997) (setting forth the license transfer safeguards for satellite radio in the Order issued by Chairman Hundt). President Obama’s nomination of Genachowski may indicate his commitment to stricter competitive policies and signal a shift back to increased merger enforcement that was present before the Bush administration. See also Taylor, *supra* note 264, at 1 (discussing the likelihood of stricter merger enforcement under the Obama administration). Among Chairman Genachowski’s first appointments was Dr. Jonathan B. Baker as Chief Economist at the FCC. Dr. Baker, an expert in the field of antitrust, has questioned the approval of the Sirius XM merger. Press Release, FCC Chairman Genachowski Announces Senior Staff in the Office of Strategic Planning (July 22, 2009), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-292164A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-292164A1.pdf); Baker & Shapiro, *supra* note 261.

competition.<sup>273</sup> While post-merger price regulation has historically been discouraged by the antitrust agencies, the FCC's reliance on regulation in the instant case could encourage the practice, especially as a justification for approving anticompetitive mergers.<sup>274</sup> Furthermore, the consolidation of such a large amount of spectrum in the Sirius XM merger could decrease the importance of pro-competitive spectrum policies that have historically informed FCC merger decisions.<sup>275</sup> By disregarding its own rule in the Satellite Radio Order requiring multiple satellite radio licensees, the FCC has set a dangerous precedent that could spur further consolidation of spectrum in monopoly providers, resulting in a decrease in competition across various platforms.<sup>276</sup>

Whatever uncertainty surrounds the future of FCC merger reviews, the Sirius XM merger has produced one inescapable conclusion: by failing to conduct a proper competitive analysis and ignoring the probable anticompetitive effects of this merger, the FCC has saddled consumers with a satellite radio monopoly. For the merged entity, now facing serious financial distress, the incentives have never been higher and the obstacles never lower to extort monopoly profits from subscribers.<sup>277</sup> Typical of its pick-and-choose antitrust review, the Commission ignored the competitive concerns of the merger and instead chose to rely on illusory efficiencies and feeble conditions imposed on the merged firm.<sup>278</sup> Unfortunately, the FCC placed all its

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273. See *supra* note 42 (noting that one of the goals of the Communications Act is to reduce "unnecessary regulation"). See generally Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, 3 J. COMPETITION L. & ECON. 471 (2007) (discussing the problems with implementing post-merger price regulation and the possibility that the practice violates the separation of powers doctrine).

274. See Malone, *supra* note 273, at 479 (discussing the DOJ's practical concerns of using rate regulation in consent decrees, including costs associated with the constant monitoring of regulated prices and indirect costs to consumers as a result of the merged firm trying to evade the mandate without violating it).

275. See EchoStar Order, 17 F.C.C.R. 20559, 20598 (2002) (discussing the Commission's "long-standing policy of promoting competition in the delivery of spectrum-based communications services").

276. See *supra* notes 52–53 and accompanying text (noting that the original rationale behind the rule was to promote and maintain competition in SDARS).

277. See Tim Arango, *Satellite Radio Still Reaches for the Payday*, N.Y. TIMES, Dec. 26, 2008, at BU 1 (reporting on the financial troubles of satellite radio and the over one billion dollars in debt that will mature in 2009). Although Liberty Media recently loaned Sirius XM \$530 million to help alleviate some of this debt, Sirius is still facing serious financial problems. See Cecilia Kang, *Liberty Extends \$530 Million Loan to Bail Out Sirius XM*, WASH. POST, Feb. 18, 2009, at D2. In May 2009, the company had to pay off \$350 million in debt and an additional \$400 million in December. *Id.* Absent another loan, the company will likely look to its own cash flow to make these payments. *Id.*

278. See *supra* Part II (analyzing the FCC's merger analysis and the flaws inherent in its application of basic antitrust principles).

faith on the word of two habitual offenders who are now exploiting the permeable conditions created by the Merger Order.<sup>279</sup> Because the likelihood of a successful challenge to the merger remains low, consumers will have to rely on the FCC's "unchecked optimism"<sup>280</sup> that the new entity will adhere to its promises and not take advantage of its newly acquired monopoly.

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279. See *supra* notes 266–268 (discussing the recent attempts by Sirius XM to exploit its monopoly power by lowering the quality of channels and increasing prices, none of which violates the Merger Order).

280. See Merger Order, 23 F.C.C.R. 12348, 12450 (2008) (Adelstein, Comm'r, dissenting) (arguing that the majority has done "little to explain why each particular condition has gone far enough to protect the public interest").