The American Antitrust Institute

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AMERICAN ANTITRUST INSTITUTE[1] CALLS ON DOJ TO FILE LAWSUIT AGAINST THE XM-SIRIUS MERGER

Year-Long Review by DOJ Spurs AAI to Call for Immediate Action

(Washington, DC) The American Antitrust Institute today urges the Antitrust Division of the Department of Justice (DOJ) to file a complaint and seek an injunction against the proposed merger of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio. Nearly a year after the proposed merger was announced, the DOJ and the Federal Communications Commission ("FCC") have compiled an extensive factual record including substantial evidence of anticompetitive harm to consumers and other firms.[2] In order to prevent a monopoly in the satellite radio market and the resulting harm to competition, the AAI believes the Antitrust Division of the DOJ must immediately file a lawsuit under Section 7 of the Clayton Act.

The AAI believes the Antitrust Division would prevail in demonstrating that satellite radio is a relevant product market and the effect of the proposed XM- Sirius merger "may be substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7. The power of the Antitrust Division of the DOJ and the Federal Trade Commission (FTC) to enforce Section 7 of the Clayton Act plays a critical role in guaranteeing the benefits of a competitive marketplace. Congress enacted Section 7 to prevent mergers and acquisitions that ***may*** substantially reduce competition in any relevant market. Congress sought to prevent excessive concentration of power in any market that would lead to higher prices, less service, lower quality, and less innovation. For decades, government enforcement of Section 7 has created a critical bulwark against mergers and acquisitions that would permanently change the marketplace and adversely affect consumers. During the past decade, government antitrust enforcement has protected competition in numerous markets vital to American consumers through federal court cases in enjoining or restructuring a merger.[3] In many cases, the government encountered significant litigation uncertainties, faced well-funded adversaries with strong arguments, was challenged to clarify important principles of law, and had few or no witnesses to support its case. Yet, in each case, the government prevailed.

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[1] The American Antitrust Institute is an independent Washington-based non-profit education, research, and advocacy organization. Its mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. For more information, please see www.antitrustinstitute.org. A list of contributors is available on request.

[2] Previously, the AAI filed comments with the FCC raising serious concerns over the competitive impact of the merger. The AAI concluded there was no basis for the FCC to abandon its rule forbidding a single satellite DARS licensee from acquiring control of the other licensee, or to retreat from its policy of ensuring competition in the delivery of services in DARS. The AAI also argued that the merger posed a significant risk of anticompetitive effects, including higher prices, reduced quality and reduced consumer choice. See Letter to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57 (June 5, 2007) available at http://www.antitrustinstitute.org/archives/files/aai-%20XM-Serius%20letter%20to%20FCC%205-1-07_060520072048.pdf

[3] In these cases, going to federal court was successful in either enjoining or restructuring mergers. These challenges led to substantial benefits to consumers: FTC v. Staples/Office Depot (office supply superstores); FTC v. BP/Arco (gasoline and other petroleum products); FTC v. Cardinal Health (drug wholesale distribution); FTC v. Heinz (baby food); United States v. Lockheed/Northrop (aircraft and sophisticated military equipment); United States v. MCI/Sprint (long distance communication and Internet backbone services); FTC v. Swedish Match (smokeless tobacco); United States v. First Data (debit card services); and United States v. DirectTV-EchoStar (satellite television).

The AAI urges the Antitrust Division to challenge the XM-Sirius merger for the following reasons:

- ***Satellite radio, standing alone, is the relevant market*** under the standards of Section 7 and the Merger Guidelines. Although the merger parties posit many alternatives, including everything audio from AM/FM radio, to Internet radio, to MP3 players and iPods, none of these offer the unique nationwide coverage of satellite radio, content, features, and ability to aggregate demand. There is no evidence, as required under the *Merger Guidelines,* that any of the audio alternatives proposed for inclusion in the market definition by the merger parties constrain the ability of the merged firm to increase prices. The complete absence of any opportunity for competitive entry into satellite radio in the foreseeable future underscores the strength of this narrow market definition as a solid foundation to a litigated challenge to the merger.
- In this properly defined market, ***this is a merger to monopoly*** and the courts have never permitted two firms to extinguish competition in such a fashion. Although some may suggest that, in some respects, "monopoly is good for you," that is a concept that has not been adopted by the courts. And for good reason – in a market like this one where entry barriers are substantial (because there are only two licenses for satellite DARS) – a monopoly is forever.
- There is substantial evidence that the merger ***would result in higher long-run prices, short-run increases in commercial time, less innovation, and reduced program choices for subscribers***. The DOJ should gain confidence from its successful challenge to the DirectTV-EchoStar merger. History has shown that by challenging the merger, consumers have benefitted through greater choice, innovation, and price competition.
- The parties may suggest the merger is benign because XM and Sirius don't compete with each other. That argument is belied by a decade of head-to-head competition. But even if that is correct, that is quite unlike many other markets, and perhaps it suggests some form of tacit collusion or comfortable accommodation between the duopolists. ***Simply because duopolists have learned how to comfortably avoid competition, they should not be given a free ticket to permanently extinguish competition through a merger.*** That result would only encourage duopolists to pull their competitive punches with the potential of extinguishing competition altogether through a merger to monopoly.
- The merging parties recognize the significant threat of competitive harm posed by this merger, as demonstrated by their elaborate set of proposed preemptive merger conditions that would establish short-term price controls and other guarantees of service and choice. Any such approach is clearly inadequate to address the long-term harm that would result from the satellite radio monopoly. In any case, for decades ***the antitrust agencies and the courts have refused to approve otherwise anticompetitive mergers based on a promise to limit prices for a period of time***.
- The most profound effects of this merger may be long-term. It is difficult to quantify the amount of innovation that will not occur if there is one monopolist rather than two rivals each striving to outdo the other, but in a high tech market this ***constraint on dynamism could be critical***.

Merger litigation is uncertain because it involves a predictive judgment. Yet Congress clearly indicated that uncertainty should not deter enforcement because Section 7 was enacted to prevent anticompetitive mergers "in their incipiency." While the AAI doesn't consider the XM-Sirius merger to be a close call, if the DOJ considers this to be a close question, the Congressional intent and strong precedent require that the Division make the decision in favor of avoiding the creation of what seems likely to be a monopoly. Even if a court might ultimately disagree, the law enforcement agency has a duty to try to block this merger.

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