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The FCC's New Formula for Mergers

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THE FCC'S NEW FORMULA FOR MERGERS

I. INTRODUCTION

Radio consumers may find it absurd to pay for any type of radio programming given that all AM and FM radio broadcasters offer their transmissions for free. Two companies tested the accuracy of this assumption in 1997 by purchasing the available satellite digital audio radio services (SDARS or DARS) spectrum to create satellite radio—a subscription-based service in which customers receive a broad array of radio programming in exchange for a monthly fee. Nevertheless, a decade after XM Satellite Radio (XM) and Sirius Satellite Radio (Sirius) licensed the SDARS spectrum, the assumption that consumers do not want to pay for radio appeared to be at least partially correct, as both companies failed to turn a profit and have almost three billion dollars of debt. Due to the high costs of launching satellites and maintaining other infrastructure, as well as the immense expenses of contracting with high-profile on-air personalities, both firms struggled financially. In March 2007, hoping to turn this dismal performance around, XM and Sirius announced plans to merge.

1. SDARS is defined as "[a] radio communication service in which audio programming is digitally transmitted by one or more space stations directly to fixed, mobile, and/or portable stations, and which may involve complementary repeating terrestrial transmitters, telemetry, tracking and control facilities." 47 C.F.R. § 25.201 (2008).


Pursuant to Title 47 of the United States Code Sections 214(a) and 310(d), the applicable standard of review the Federal Communications Commission (FCC) must utilize is whether the applicants demonstrate that the transfer of control of the licenses from one company to another will serve the public interest, convenience, and necessity. The FCC uses this broad, well-established statutory test to determine whether the potential benefits of the transaction outweigh the potential harms. If so, then the public interest standard is met and the FCC will approve the merger. In their application to the FCC, XM and Sirius (the Applicants) argued that increased benefits would flow to the public from the merger, including increased program efficiency and over three billion dollars in potential savings. In addition to these merger-specific benefits, the Applicants agreed to offer, for a three-year period, lower subscription rates, new subscription plans, and à la carte programming, which would allow subscribers to choose individual channels from either company. The Applicants proposed these conditions on the merger and the FCC ultimately found that, absent these self-imposed constraints, the merged entity (Sirius XM) would in fact monopolize the market. However, the FCC found that because XM and Sirius voluntarily committed to mitigate any monopolistic effects of the merger, the merger would generate public interest benefits that would outweigh any harm to the market. In July 2008, the FCC approved the merger that created Sirius XM Satellite Radio (Sirius XM), even though such a merger is contrary to governmental policies and basic economic principles.

After approving the formation of a monopoly in the satellite radio industry, the FCC traded the long-term interest of radio consumers for short-term benefits. Indeed, the Applicants can neither guarantee that benefits promised by the companies will flow to the public, nor can they guarantee that the FCC-approved merger will secure Sirius XM’s financial future. The FCC was misguided in permitting the merger for several reasons: (1) Sirius XM is only required to follow the self-imposed

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7. See, e.g., Sirius XM Memorandum Opinion and Order, supra note 3, at 12363.
8. See infra Part II.D.
9. See infra Part II.D.
10. In re Sirius XM Consolidated Application, supra note 6, at 18 n.39.
11. Id. at i–ii.
13. Sirius XM Memorandum Opinion and Order, supra note 3, at 12352.
14. See id. at 12350.
THE FCC’S NEW FORMULA FOR MERGERS

constraints for three years,\(^\text{15}\) (2) the FCC order allows Sirius XM to increase subscription costs if the company experiences poor growth,\(^\text{16}\) (3) both Sirius and XM refused to comply with FCC orders in the past,\(^\text{17}\) (4) the FCC contradicted its own public interest analysis that it used a mere six years earlier when it denied a merger between the only two satellite television giants—EchoStar and DirecTV,\(^\text{18}\) and (5) the FCC adopted a “worst-case scenario” approach that allegedly protects consumers from harm but, in fact, actually insulates this incorrect decision from review.\(^\text{19}\)

By avoiding the review process through its worst-case scenario assumption and allowing Sirius XM’s self-imposed restrictions, the FCC set a dangerous precedent whereby proposed anticompetitive monopolies will be approved in the future.

Part II of this Comment explains the role of the FCC in SDARS regulation, the development of satellite radio, and provides an overview of the merger process, with attention focused on the FCC’s public interest analysis. Part III provides background information on the denied EchoStar-DirecTV merger and the approved Sirius XM merger. Part IV discusses the potential harms that may flow from the Sirius XM merger and how consumers may not benefit in the future. This section also demonstrates how the FCC did not follow its analysis set forth in the EchoStar-DirecTV transaction, and discusses how a lack of competitors in the field will not lead to any price discipline. Furthermore, Part IV analyzes the flaws in the voluntary conditions, predicting how Sirius’ and XM’s noncompliance with FCC orders in the past could indicate their willingness to disregard the conditions of this merger. Finally, Part V concludes with an analysis of the current state of the satellite radio industry and the effect of the FCC’s recent decision—namely, transforming the public interest framework into a private interest framework benefiting companies rather than consumers.

\(^{15}\) Sirius XM Press Release, \textit{supra} note 12.\(^\)\
\(^{16}\) Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12394.\(^\)\
\(^{17}\) \textit{See infra} Part IV.\(^\)\
\(^{18}\) \textit{See infra} Part IV.A.\(^\)\
\(^{19}\) \textit{See 47 U.S.C. § 309(e) (2006)} (“If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor . . . .”) (emphasis added).
II. BACKGROUND

A. An Overview of the Federal Communications Commission and Spectrum Management

The Communications Act of 1934 (Communications Act) established the FCC and gave the agency broad power and jurisdiction to regulate the electromagnetic spectrum in the public interest. With this power, the FCC has the authority to allocate the electromagnetic spectrum, establish general operational guidelines, and grant licenses for the use of the spectrum. This "spectrum" encompasses "the entire range of electromagnetic radio frequencies used in the transmission of sound, data, and video." Congress granted the FCC the power to responsibly and strategically manage the spectrum because it is a finite source with a growing demand. Spectrum uses include personal use for garage door openers and computer modems, private use by organizations for radio and television broadcasts, and public use for police and emergency medical technicians. Since the spectrum remains a scarce source with many uses, "one person's transmission is another's interference." Therefore, "[c]ongress concluded that the federal government has the duty both to select who may . . . broadcast and to regulate the use of the electromagnetic spectrum to serve the public."

Given these various spectrum uses, the FCC developed a system whereby it relies on market forces to shape its spectrum management because market forces allow flexibility to respond to the changing wireless communications market. The FCC adopted this approach because "[a]s liberalization, privatization, and competition increasingly characterize wireless communications policy around the world, market-based licensing policies will play a critical role in ensuring that the benefits of telecommunications technologies and services are made available to the

21. See generally id.
23. Id.
24. See id.
26. Id.
27. KENNARD, supra note 20, at VII-2.
widest range of people in the most timely and efficient manner."\textsuperscript{28} Furthermore, the FCC manages the spectrum through "frequency allocations, allotments, and assignments."\textsuperscript{29}

The FCC currently uses competitive bidding (auctioning) to assign licenses whenever competing applicants file applications to use the same limited spectrum.\textsuperscript{30} Auctions are used because they assign licenses quickly to the highest bidding entity and preserve the public interest in the spectrum by recovering its full value.\textsuperscript{31}

B. The Beginning of Satellite Radio

Satellite radio traces its beginnings to 1992, when the FCC decided to devote part of the spectrum toward a nationwide distribution of digital radio service via satellite.\textsuperscript{32} The FCC auctioned off SDARS in the 2320 to 2345 MHz spectrum band to both XM and Sirius because of the increased public benefits this new medium of broadcasting could provide.\textsuperscript{33} Satellite radio offered more channel choices, fewer commercials, live audio streaming of sporting events, weather and traffic information, an assortment of sports, talk and news stations, and niche music stations to suit any musical taste.\textsuperscript{34} These new services delivered a crisp digital signal that, with the use of a transponder, could be transmitted throughout the whole country and benefit consumers.\textsuperscript{35}

The satellite radio industry began in 1997 with high expectations of numerous public benefits.\textsuperscript{36} For instance, the FCC found that SDARS would "benefit communities where terrestrial broadcast service [was] less abundant"\textsuperscript{37} and could provide new services that local radio could not provide.\textsuperscript{38} With its national reach, SDARS promised to provide continuous radio service to the long-distance commuting public and to people living in

\begin{footnotes}
\footnote{28. \textit{Id.} at VII-5.}
\footnote{29. \textit{Id.} at VII-3.}
\footnote{30. \textit{Id.} at VII-6.}
\footnote{31. \textit{Id.}}
\footnote{33. Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12350.}
\footnote{34. See \textit{What is Sirius}, \textit{supra} note 2; \textit{What is XM}, \textit{supra} note 2.}
\footnote{35. See \textit{What is Sirius}, \textit{supra} note 2; \textit{What is XM}, \textit{supra} note 2.}
\footnote{37. \textit{Id.}}
\footnote{38. \textit{Id.}}
\end{footnotes}
remote areas. \textsuperscript{39} Satellite radio also offered new forms of emergency services. \textsuperscript{40} The FCC found that the implementation of SDARS would foster the development of new technology, more customer-oriented programming, and diversification of program formats, which would provide valuable niche programming. \textsuperscript{41}

On March 3, 1997, the FCC adopted rules for the auction of two 12.5 MHz SDARS authorizations in the 2320-2332.5 MHz and 2332.5-2345 MHz frequency bands. \textsuperscript{42} The FCC decided to license only two satellite DARS systems. \textsuperscript{43} Until recently, XM and Sirius continued to be the only two SDARS service providers, and the companies individually held their spectrum licenses. \textsuperscript{44} Now that the FCC has approved the merger between the two companies, they can transfer these licenses \textsuperscript{45}—something that was prohibited when the FCC granted the companies their initial licenses in 1997. \textsuperscript{46}

On March 28, 1997, XM (formerly American Mobile Radio Corporation) and Sirius (formerly Satellite CD Radio) placed winning bids for approximately $89 million \textsuperscript{47} and $83 million \textsuperscript{48} respectively. Because these two corporations were the only companies entering the satellite radio market, they were each other’s biggest competition.

In promulgating its rules for SDARS, the FCC stressed the importance that competition would play in benefiting the public interest. \textsuperscript{49} It prohibited the transfer of licenses because it wanted to ensure sufficient competition in the SDARS industry. \textsuperscript{50} In fact, the FCC viewed

\textsuperscript{39} Id. at 5760–61.

\textsuperscript{40} Id.

\textsuperscript{41} Id. at 5761–62.

\textsuperscript{42} See SDARS Rules, supra note 36, at 5758.

\textsuperscript{43} Id. at 5756. Only 25 MHz of spectrum was available to license and the FCC decided that a viable and competitive satellite DARS service would require 12.5 MHz of spectrum. Thus, the FCC auctioned off only two licenses.

\textsuperscript{44} Sirius and XM were the only two of four companies granted licenses to provide SDARS services. See FCC Order and Authorization In re American Mobile Radio Corp., Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service, Order and Authorization, 13 F.C.C.R. 8829 (1997) [hereinafter XM Authority to Operate]; FCC Order and Authorization In re Satellite CD Radio, Inc., Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service, Order and Authorization 13 F.C.C.R. 7971 (1997) [hereinafter Sirius Authority to Operate].

\textsuperscript{45} Sirius XM Memorandum Opinion and Order, supra note 3, at 12352.

\textsuperscript{46} SDARS Rules, supra note 36, at 5823.

\textsuperscript{47} Sirius Authority to Operate, supra note 44, at 7971.

\textsuperscript{48} XM Authority to Operate, supra note 44, at 8829.

\textsuperscript{49} See SDARS Rules, supra note 36, at 5754.

\textsuperscript{50} Id. at 5823 ("Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of
competition between SDARS providers as essential when auctioning off the licenses, and believed that licensing two providers would ensure that subscription rates would stay low and provide more diversity in radio programming. Ultimately, as a safeguard for promoting competition, the FCC prohibited one licensee from acquiring control of the other SDARS license. The FCC concluded that "given the overall competitive environment within which it will operate, . . . licensing two satellite DARS providers will serve the public interest" because "[l]icensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices." The FCC was adamant about having only two separate services, as no auction participant was allowed to purchase both licenses at the auction. Further, the FCC required that the companies each make an interoperable receiver that would be capable of receiving broadcasts from either company. The FCC explained that "[t]his rule also will promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers." The FCC, therefore, made it clear that at the genesis of satellite radio, competition between two companies would be critical.

However, nearly eleven years after ruling on its commitment to ensuring competition, the FCC allowed two competing companies in the industry to merge into one entity, Sirius XM.

C. An Overview of the DOJ, FTC, and FCC Merger Approval Process

All proposed merger applications in the telecommunications industry that are subject to FCC regulations must be approved by both the Department of Justice (DOJ) and the Federal Trade Commission (FTC) before the FCC begins its approval process. Generally, the DOJ and FTC refer to federal antitrust laws found in Section 7 of the Clayton Antitrust Act, Section 1 of the Sherman Antitrust Act, and Section 5 of the Federal

control will help assure sufficient competition in the provision of satellite DARS service.")(emphasis added).

51. See id. at 5786.
52. Id. at 5786.
53. Id. at 5823.
54. Id. at 5786.
55. SDARS Rules, supra note 36, at 5786.
56. Id. at, 5796–98.
57. Id.
Trade Commission Act. Respectively, these antitrust laws ensure that mergers do not lessen competition, restrain trade, or create unfair methods of competition.

In *FTC v. H.J. Heinz Co.*, the FTC brought suit under the Clayton Act to prevent a merger between the second and third largest producers of jarred baby food. The appellate court reversed the district court’s decision to allow the merger, noting how “there had been no significant entries in the baby food market in decades and that new entry was ‘difficult and improbable’.” Therefore, the appellate court denied the merger, as “no court has ever approved a merger to duopoly under similar circumstances.”

Similarly, in *FTC v. Staples, Inc.*, the FTC brought suit to enjoin a merger between two office product superstores, arguing that the acquisition would substantially lessen competition in violation of the Clayton Act and the Federal Trade Commission Act. Observing that the merger would create a monopoly in certain markets, the court held that “eliminating Staples’ most significant, and in many markets only, rival, this merger would allow Staples to increase prices or otherwise maintain prices at an anti-competitive level.” As such, the court granted the preliminary injunction, providing that the proposed merger may substantially lessen competition and violate Section 7 of the Clayton Act.

Finally, in *U.S. v. Franklin Electric Co. Inc.*, the government brought suit to enjoin the only two companies that developed, manufactured, and sold specialized underground pumps at gas service stations from merging. The court noted that “[n]o merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized.” Additionally, the parties’ claims that the merger would create economic efficiencies that would lead to consumer benefits were too speculative in nature and not substantiated by evidence.

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60. Id.
62. Id. at 717 (quoting FTC v. H.J. Heinz Co., 116 F. Supp. 2d 190, 196 (D.D.C. 2000)).
63. Id.
65. Id. at 1082.
66. Id. at 1093.
68. Id. at 1035.
69. Id.
Further, the court held "[i]t would be odd if a merger of the kind at issue, from two producers to one, could be justified by either the efficiencies it would generate or because the company to be acquired is failing." The court ultimately held that the merger created the possibility of a substantial impairment of competition and granted the preliminary injunction.

The above cases illustrate how antitrust laws are geared towards preventing mergers that result in a reduction of competition in the marketplace. The FTC and DOJ highly scrutinize mergers that result in a monopolized market, especially when the barriers to entry are high and the claimed benefits of the merger are too speculative. Once a proposed merger obtains approval from the FTC and DOJ, the next step in the merger process involves FCC review.

In order to get FCC approval for a merger, first, the proposed applicant files an application with the FCC to transfer its telecommunications licenses. Next, the FCC gathers information via a "notice and comment" procedure in which it issues a notice of the proposed license transfer, solicits comments from third parties, and gathers responses from the applicant firms. Finally, pursuant to the Communications Act, the FCC balances the potential harms of the merger against the potential benefits to determine whether approving the merger would serve the public interest.

D. FCC Review Pursuant to the Communications Act of 1934

The FCC refers to Sections 214(a) and 310(d) of the Communications Act to determine whether the merger applicants have demonstrated that the proposed transfer of licenses will serve the public interest, convenience, and necessity. Therefore, the burden of proof is on the applicants to demonstrate that the transfer of control of the licenses is in the public interest.

70. Id.
71. Id.
72. See 47 U.S.C. § 308 (1996) ("The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefore received by it . . . ."); Donald J. Russell & Sherri L. Wolson, Dual Antitrust Review of Telecommunications Mergers by the DOJ and the FCC, 11 GEO. MASON L. REV. 143, 148 (2002).
73. Russell & Wolson, supra note 72, at 148.
interest. Although Congress did not define "the public interest, convenience, or necessity" in the Communications Act, its intent is to preserve and enhance competition in relevant markets and to ensure a diversity of sources of information and services to the public. The FCC "may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within the communications industry." In order to determine whether a merger would be in the public interest, the FCC employs a balancing test, weighing the possible harms of the proposed transaction against the possible benefits. "Meeting [this] burden typically involves demonstrating that the merger is not likely to significantly reduce competition, or that any likely anticompetitive effect is more than offset by other benefits." Generally, if the benefits to the consumers outweigh the possible harms, the public interest test is satisfied, and the proposed merger will receive FCC approval. Furthermore, the FCC has noted that "[t]he public interest in this regard is the provision of services of value to the listening public and includes the protection of competition, not competitors." Moreover, to facilitate the public interest, the FCC may "waive specific requirements of the rules on its own motion or upon request" when "[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest." In addition, courts generally allow the FCC much discretion in determining what actions are in the public interest. The Supreme Court has emphasized, and continues to emphasize, the FCC's duty and authority under the Communications Act to promote diversity and competition in the media. Deferring to the FCC, the Supreme Court held that "[t]he avowed

76. New EchoStar Memorandum Opinion and Order, supra note 75, at 20574.
78. Id. at § 521(6).
79. Id. at § 532(a).
80. Sirius XM Memorandum Opinion and Order, supra note 3, at 12365.
81. Id. at 12364.
82. Frankel, supra note 58, at 201 (discussing the burden of proof on the merging parties).
83. SDARS Rules, supra note 36, at 5759.
84. 47 C.F.R. § 1.925(a) (2008).
85. Id. at § 1.925(b)(3)(i).
86. See FCC v. RCA Commc'ns, Inc., 346 U.S. 86, 90 (1953) (holding that the FCC is not required to make specific findings of tangible benefit when determining if the public interest would be served by competition).
aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States" and that Congress gave the FCC "comprehensive powers to promote and realize the vast potentialities of radio." The public interest test is thus a flexible Supreme Court approved standard that the FCC can use to deny or approve a merger.

The FCC rarely denies applications. Typically, the FCC approves applications on their face or approves them after the applicants voluntarily amend their applications to impose restraints or conditions to mitigate the FCC's concerns of anticompetitive behavior. In fact, most license transfer applications are non-controversial, enabling the FCC to give approval within a short amount of time. If the FCC, after weighing the possible benefits against the possible harms, finds that the transaction does not serve the public interest, or if the record presents a substantial and material question of fact, then the FCC designates the application for hearing under Section 309(e) of the Communications Act. Conversely, without a substantial or material question of fact, the FCC's decision is not subject to review. Courts have held that not all applications pending before the FCC must be designated for hearing. Finally, to determine whether the facts in question are substantial or material, they need not be in dispute.

The FCC's competitive analysis under the public interest test is broader than that of the DOJ and the FTC review. The FCC considers "whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more expansive view of potential and future competition and its impact on the relevant market." Furthermore, the DOJ and FTC reviews are limited to the competitive effects of the acquisition "without reference to diversity [of broadcasts], localism, or

89. Russell & Wolson, supra note 72, at 149 (Instead of the FCC flat out denying an application to merge, the FCC will informally identify any significant competitive concerns that it finds. The applicants then voluntarily amend their application to reflect these concerns or the FCC will impose conditions on the license transfers and authorizations).
90. Id.
91. Id. (citing FCC, 2001 Annual Program Performance Report, 12 (2001)).
93. See, e.g., Hartford Commc'ns Comm. v. FCC, 467 F.2d 408, 411 (D.C. Cir. 1972).
95. Sirius XM Memorandum Opinion and Order, supra note 3, at 12366.
96. HORIZONTAL MERGER COMMENTARY, supra note 59, at 2 (2006) ("[T]he Agencies examine whether the merger of two particular rivals matters, that is, whether the merger is likely to affect adversely the competitive process, resulting in higher prices, lower quality, or reduced innovation.").
other public interest considerations." The FCC, therefore, considers multiple factors in determining whether the merger benefits will outweigh the potential harms. However, one similarity between the DOJ/FTC review and the FCC review is that the FCC adopts the DOJ/FTC provisions for geographic and products markets when analyzing the horizontal effects of the proposed merger.98

E. Defining the Product and Geographic Markets

The FCC adopts the DOJ/FTC Guidelines (Guidelines) to analyze the effects a merger will have on the relevant product and geographic markets.99 Integrating the product and geographic markets allows the agencies to create a market definition, referred to as the "hypothetical monopolist" test. This test "identifies which product(s) in which geographic locations significantly constrain the price of the merging firms' products."100 A horizontal transaction occurs when the firms in the transaction buy or sell services or products that belong to the same relevant product and geographic markets and when the services or products are reasonable substitutes.101 Because of the nature of horizontal transactions, the FCC usually denies such mergers because allowing horizontal mergers eliminates competition and increases concentration in the relevant markets.102

The Guidelines define the relevant product market as "a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price" (the "SSNIP test").103 This definition depends heavily upon demand-side substitution, which is a consumer's willingness to switch between products in response to a price change.104 In other words, the

97. Sirius XM Memorandum Opinion and Order, supra note 3, at 12366.
98. Id. at 12367.
99. Id.
100. HORIZONTAL MERGER COMMENTARY, supra note 59, at 5.
102. HORIZONTAL MERGER COMMENTARY, supra note 59, at 2–3.
104. HORIZONTAL MERGER COMMENTARY, supra note 59, at 5; see also U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956) (stating that "[t]he varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities
product market definition tests whether a consumer, when faced with a price change, is willing to stop buying that product and, instead, buy a similar product from another company at a different price.

The Guidelines define the relevant geographic market as "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere." 105 Under this approach, the FCC begins its analysis by finding the areas in which the merging firms compete with respect to the relevant product. The FCC then extends the boundaries of that area until determining a geographic area in which a hypothetical monopolist could raise prices by at least a "small but significant and non-transitory amount." 106 Under these conditions, in a geographic market without a monopoly, a consumer would have more than one price at which to purchase a product. With these considerations in mind, the FCC begins its public interest framework to determine whether a merger should be approved.

III. THE ECHOSTAR-DIRECTV AND XM-SIRIUS SATELLITE RADIO MERGERS UNDER THE FCC PUBLIC INTEREST FRAMEWORK

A. The Denied Echostar-DirecTV Merger

The FCC denied the EchoStar-DirecTV merger (collectively, New EchoStar Applicants) because the merger would have likely harmed competition in the multichannel video program distribution (MVPD) market, 107 thereby outweighing any merger-specific public interest benefits. 108 Specifically, the FCC found that the loss of competition within

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105. HORIZONTAL MERGER GUIDELINES, supra note 103, at § 1.21.
106. HORIZONTAL MERGER COMMENTARY, supra note 59, at 5–6; see also United States v. Grinnell Corp., 384 U.S. 563, 589 (1966) (stating that "[t]he central issue is where does a potential buyer look for potential suppliers of the service—what is the geographical area in which the buyer has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities? This depends upon the facts of the market place, taking into account such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency.").
107. Richard Gilbert & James Ratliff, Sky Wars: The Attempted Merger of EchoStar and DirecTV 4 (2000), els.berkeley.edu/users/gilbert/wp/Dish-DirecTV_merger.pdf ("MVPD suppliers are entities that offer multiple channels of video programming for purchase by subscribers or customers.").
the MVPD market would harm consumers by eliminating an existing competitor in every market, which would not only create potentially higher prices and lower service quality, but would also reduce future innovation.\textsuperscript{109}

1. Description of the Companies at the Time of the Merger

EchoStar, an early innovator in the satellite television business, designed the first nationwide installation network dedicated solely to satellite television systems.\textsuperscript{110} Since 1996, EchoStar has been providing continuous direct broadcast satellite (DBS) service to customers throughout the United States.\textsuperscript{111} Hughes, a wholly owned subsidiary of General Motors (GM),\textsuperscript{112} directly owned all of DirecTV Enterprises, Inc. and remained EchoStar's only satellite television competition in the market.\textsuperscript{113} Unlike the Sirius XM Applicants, the New EchoStar Applicants had no financial problems at the time of the proposed merger.\textsuperscript{114}

2. The Proposed EchoStar-DirecTV Merger

The New EchoStar Applicants promised that many benefits would result from the merger.\textsuperscript{115} Along with being the single provider of DBS service in the United States,\textsuperscript{116} New EchoStar would hold all authorizations for the DBS frequencies and provide broadcasting to areas previously not served by either company.\textsuperscript{117} The New EchoStar Applicants claimed that the merger would allow DBS to be more competitive with cable systems in the MVPD market because of the

\textsuperscript{109} New EchoStar Memorandum Opinion and Order, \textit{supra} note 75, at 20663.

\textsuperscript{110} Application of EchoStar Communication Corporation, General Motors Corporation, Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee, for Authority to Transfer Control, Consolidated Application for Authority to Transfer Control, at 9 (2001) [hereinafter New EchoStar Consolidated Application].

\textsuperscript{111} \textit{Id.} at 10.

\textsuperscript{112} \textit{Id.} at 12.

\textsuperscript{113} \textit{See id.} at 12–13.

\textsuperscript{114} \textit{See id.} at 13 (stating DirecTV had over 10.3 million subscribers as well); according to an SEC filing, as of June 30, 2002, EchoStar had 7.46 million subscribers, \textit{see} EchoStar Commc'ns Corp., Quarterly Report (Form 10-Q), at 18–22 (Jun. 30, 2002); Gen. Motors Corp., Quarterly Report, (Form 10-Q), at 20 (Jun. 30, 2002) (showing that both DirecTV and Echostar experienced increases in revenue prior to filing their applications to merge).\textsuperscript{115}

\textsuperscript{115} New EchoStar Consolidated Application, \textit{supra} note 110, at i–ii.

\textsuperscript{116} EchoStar Commc'ns Corp., Quarterly Report (Form 10-Q) at 18 (June 30, 2002).

\textsuperscript{117} \textit{See} New EchoStar Memorandum Opinion and Order, \textit{supra} note 75, at 20571–72.
elimination of overlapping programming services. The merger would also further expand programming choices and create new services for DBS customers. However, despite these claimed benefits, which could have increased competition in the MVPD market, the FCC denied the merger.

3. The FCC Ruling

The proposed transaction raised significant concerns with the FCC because, for the majority of consumers, the merger would reduce the number of competitors in the cable industry, resulting in either a duopoly or monopoly. Relying on antitrust principles, the FCC concluded that "a merger to duopoly or monopoly faces a strong presumption of illegality" and that "where a proposed merger would result in a significant increase in concentration in an already concentrated market, parties advocating the merger will be required to demonstrate that claimed efficiencies are particularly large, cognizable and non-speculative."

In coming to its relevant product market definition, the FCC worried about the new company’s ability to potentially eliminate non-satellite television competition in the television broadcasting industry and thus raise prices. Cable and DBS providers differ in the specific characteristics of their service packages and the number of channels they are able to offer. Since DBS is able to offer more channel choices than typical cable systems, DBS providers have an incentive to raise prices. Because the DBS service can offer these more attractive packages, consumers will be willing to pay higher prices for DBS, resulting in a loss of cable television subscribers. Additionally, New EchoStar would have a greater incentive and ability to raise prices after the merger in areas served by low-capacity cable systems compared to areas served by high-capacity systems. Any price discipline from having a cable competitor would then disappear, and the merged entity would eliminate competition in the MVPD market.

118. See New EchoStar Consolidated Application, supra note 110, at 27.
119. Id. at 20–21.
120. See generally New EchoStar Memorandum Opinion and Order, supra note .75, at 20559.
121. Id. at 20604.
122. Id. at 20605.
123. Id. at 20605–06.
124. Id. at 20608.
125. Id.
126. See New EchoStar Memorandum Opinion and Order, supra note 75, at 20608.
127. Id.
128. Id.
Based on the above factors, the FCC was unable to conclusively define the product market. However, it adopted EchoStar and DirecTV's proposal for a MVPD product market, as this was the broadest of any proposed market definition and tended to minimize any anticompetitive harm in the analysis.

The two companies urged the FCC to adopt the relevant geographic market as national in scope due to their national pricing plans for monthly subscriptions. However, the FCC determined that the relevant market was local because consumers make their decisions based on the MVPD choices at their residences. The FCC stated that the geographic market was each customer's residence, and ultimately concluded that, "the relevant geographic market should be presumed to be the franchise area of a local cable operator, since customers within that franchise area have the choice between the incumbent franchised cable company and the two DBS providers."

Based on the FCC's findings that MVPD was the relevant product market for DBS and that the geographic market was local, the FCC determined that the proposed deal was anti-competitive in nature due to the unilateral steps the new entity could take to increase prices. Therefore, since the transaction could have increased concentration in an already concentrated market, the FCC denied the merger, citing the possibility that the merging firms would find it profitable to unilaterally raise prices and suppress output. Furthermore, the FCC found that the merger in the MVPD industry would result in collusion among MVPD providers because "research [had] shown that firms in concentrated, oligopoly markets take their rivals' actions into account in deciding the actions they will take." Hence, the MVPD providers and the new DBS service would engage in interdependent, anti-competitive conduct of raising prices. The FCC determined that the consumer harms resulting from the abovementioned unilateral effects, which failed to take into account MVPD

129. Id. at 20609.
130. Id.
131. Id.
132. New EchoStar Memorandum Opinion and Order, supra note 75, at 20610.
133. Id.
134. Id. at 20620.
135. Id. at 20616.
136. Id. at 20620.
137. Id. at 20625.
138. New EchoStar Memorandum Opinion and Order, supra note 75, at 20624.
139. Id.
collusion, seriously underestimated the harms to consumers post-merger.\textsuperscript{140}

The FCC next determined from the record that a merger would reduce innovation and service quality.\textsuperscript{141} The FCC noted that both DirecTV and EchoStar improved their services and types of programming offered, but that these changes were motivated by competitive pressures between the two companies.\textsuperscript{142} Post-merger, the FCC feared that this decreased competition could have created a disincentive to improve services or quality.\textsuperscript{143}

The FCC also examined the potential public interest benefits that the merger may have in the MVPD market.\textsuperscript{144} The EchoStar Applicants urged that the merger would enable them to improve spectrum efficiency by eliminating duplicative programming.\textsuperscript{145} This would allow them to offer both new and improved services to consumers\textsuperscript{146} and also result in potential cost-savings benefits.\textsuperscript{147} However, the FCC found that these spectrum efficiencies would not necessarily result in merger-specific public interest benefits\textsuperscript{148} and that the cost savings were too speculative.\textsuperscript{149} First, the FCC noted how the efficiencies would result in private economic cost savings benefits for New EchoStar, but that these savings would not translate into lower costs for the public.\textsuperscript{150} Additionally, the FCC noted the possibility that New EchoStar would use the spectrum less efficiently than either company would individually use it absent the merger.\textsuperscript{151} Accordingly, the FCC held that the claimed benefit arising from the EchoStar Applicant's promise for increased programming was highly speculative and appeared to lack credibility.\textsuperscript{152}

The EchoStar Applicants also claimed that they would be better able to compete with cable systems as a single full-service DBS provider to the benefit of customers.\textsuperscript{153} The FCC agreed that the new entity would be a more capable competitor for cable customers, but that this did not translate

\textsuperscript{140.} Id. at 20625–26.
\textsuperscript{141.} Id. at 20626.
\textsuperscript{142.} Id.
\textsuperscript{143.} See id.
\textsuperscript{144.} New EchoStar Memorandum Opinion and Order, supra note 75, at 20630.
\textsuperscript{145.} Id. at 20631.
\textsuperscript{146.} Id.
\textsuperscript{147.} Id. at 20637–38.
\textsuperscript{148.} Id. at 20633.
\textsuperscript{149.} Id. at 20637.
\textsuperscript{150.} New EchoStar Memorandum Opinion and Order, supra note 75, 20632–33.
\textsuperscript{151.} Id. at 20633.
\textsuperscript{152.} Id. at 20634.
\textsuperscript{153.} New EchoStar Consolidated Application, supra note 110, at i.
into more effective competition in the MVPD marketplace to the benefit of consumers. 154

For the above reasons, the FCC determined that the EchoStar Applicants did not meet their burden of demonstrating that the merger was in the public interest. 155 Importantly, the FCC noted its own "long history of establishing spectrum-based commercial services with no fewer than two participants per service, with the aim of creating competitive markets for spectrum-based voice, video and data services." 156 Indeed, the FCC could find "no example where [it] permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service." 157 The FCC essentially believed that the purpose of the EchoStar application was to "approve the replacement of viable facilities-based competition with regulation." 158 The FCC viewed the two DBS providers as healthy competitors and found that approval would be inconsistent with the Communications Act and FCC regulatory policies, which aim to replace regulatory safeguards with free market competition in situations where a single provider serves an entire market. 159 The FCC correctly concluded that permitting a single licensee to hold the entire spectrum to a single service would be detrimental to competition and consumers. This burden on competition and harm to consumers greatly outweighed any of the above mentioned benefits of the transactions, thus failing the public interest standard. 160

B. The (Wrongly) Approved XM-Sirius Merger

Five years after the FCC denied the EchoStar-DirecTV merger, the FCC was once again given the opportunity to rule on a proposed merger that would similarly permit a single commercial spectrum licensee to hold the entire available spectrum of a particular service. 161 The FCC similarly found that permitting such a transaction would create a monopoly. 162 However, it distinguished this case from EchoStar on the grounds that the voluntary commitments taken by Sirius XM would mitigate all

154. New EchoStar Memorandum Opinion and Order, supra note 75, at 20639.
155. Id. at 20646.
156. Id. at 20662.
157. Id.
158. Id.
159. Id. at 20663.
160. New EchoStar Memorandum Opinion and Order, supra note 75, at 20646.
161. See New EchoStar Press Release, supra note 108; see Sirius XM Memorandum Opinion and Order, supra note 3, at 12360.
162. New EchoStar Memorandum Opinion and Order, supra note 75, at 20604.
monopolistic effects and therefore be in the public interest.\(^{163}\) Going against prior precedent, the FCC allowed Sirius and XM to merge into Sirius XM Radio, granting this new entity the entire available spectrum to satellite radio.\(^{164}\)

1. Description of the Companies at the Time of the Merger

Unlike EchoStar and DirecTV, both XM and Sirius were heavily in debt at the time of the merger, and still are as a combined entity.\(^ {165}\) However, the companies believed that as a merged entity, they could potentially lower their costs and prevent their systematic failures.\(^ {166}\)

Prior to the merger, XM offered over 170 music channels to over 9.03 million subscribers and used half of the available SDARS spectrum.\(^ {167}\) XM transmitted its content throughout the United States to vehicles, portable receivers, home receivers, plug-and-play receivers, and had agreements to install SDARS receivers in different vehicle models for various vehicle manufacturers.\(^ {168}\) Several of its channels were devoted to Major League Baseball, the National Hockey League, the Indy Racing League, traffic and weather channels, and an emergency station.\(^ {169}\)

Gaining most of its revenue through its subscription services, XM was unable to turn a profit.\(^ {170}\) At the time of the merger application, it was $1.5 billion in debt.\(^ {171}\) Warning investors in its 2007 annual 10-K filing, XM admitted, "[u]nless we continue to increase our revenues, we may not be able to operate our business and service our indebtedness and you could lose money on your investment."\(^ {172}\)

XM pointed out numerous vulnerabilities to the viability of its service.\(^ {173}\) In order to become profitable, XM had to attract and retain more subscribers, maintain the costs of attracting and retaining subscribers and programming, compete successfully, and operate at an acceptable

\(^{163}\) Sirius XM Memorandum Opinion and Order, supra note 3, at 12376.
\(^{164}\) See infra Part III.A.3.
\(^{165}\) See Sirius Annual Report, supra note 4, at 18; XM Annual Report, supra note 4, at 17.
\(^{167}\) Sirius XM Memorandum Opinion and Order, supra note 3, at 12353.
\(^{168}\) Id. at 12354.
\(^{169}\) Id. at 12353–54.
\(^{170}\) XM Annual Report, supra note 4, at 7.
\(^{171}\) Id. at F-6.
\(^{172}\) Id. at 18.
\(^{173}\) See id. at 17–25.
level. The company also exposed its economic vulnerability by admitting that it may never become profitable because demand for its service may not be strong enough. For its business plan to work, XM needed additional financing which may not have been offered at favorable terms. Furthermore, XM had expensive contracts with General Motors, Major League Baseball, and on-air personalities, faced potential loss and degradation of its satellites, suffered competition from other forms of music players and providers, incurred increased marketing costs, and received low advertising revenues. Therefore, it was no surprise when XM decided to enter into a merger agreement with Sirius.

Sirius offered over 130 channels to over 8.3 million subscribers through its satellite radio service. Along with various music programming, Sirius offered weather and traffic coverage, emergency information, National Basketball Association games, National Football League games, NASCAR races, college sports events, as well as many different talk radio programming including personalities such as Howard Stern, Martha Stewart, and Barbara Walters. Additionally, Sirius had agreements with car manufacturers to include SDARS receivers in vehicles.

As of December 31, 2007, Sirius was approximately $1.3 billion in debt, which if Sirius defaulted, could have forced it to discontinue operations or sell its assets. Potential harms of the debt included: limited abilities to borrow additional funds, limited flexibility in planning or reacting to changes in the industry, increased vulnerability to adverse economic and industry conditions, and being forced into dedicating a substantial portion of its cash flow from operations to pay off the debt. These factors would reduce the availability of money to fund capital expenditures and other corporate purposes, and would place Sirius at a

174. Id. at 18.
175. Id.
176. XM Annual Report, supra note 4, at 19.
177. Id.
178. Id. at 20.
179. Id. at 21.
180. Id. at 22.
181. Id. at 23.
183. Id. at 12356.
184. Id. at 12357.
185. Sirius Annual Report, supra note 4, at F-5.
186. Id. at 18.
competitive disadvantage to XM Radio. Sirs was concerned that it may never turn a profit due to its debt and growing interest payments on the existing debt and that the costs to renew its programming may be more expensive than previous arrangements. Sirius spent substantial money on advertising and marketing to attract new customers and prevent an ongoing loss of current customers to XM. Because its primary source of revenue was subscription fees, activation fees, and the sale of Sirius radios, Sirius’ loss of customers to XM could have been disastrous to the company.

Although their programming may seem similar, XM and Sirius each have significant engineering differences between their audio receivers. In fact, there is no interoperable receiver capable of accessing all licensed SDARS systems. Although both companies use satellite and terrestrial repeaters to deliver their programming to subscribers, each has taken a different approach in utilizing the transmission of programming. XM operates its system using two active geostational satellites in orbit, whereas Sirius uses three satellites in an inclined, elliptical non-geostationary orbit. The differences in the orbital location affect the design of the antennas used to receive the satellites signals, the terrestrial repeater network used to augment the satellite service, and the uplink antennas used to communicate with satellites. Additionally, the two companies use their 12.5MHz of spectrum differently. Sirius divides its spectrum into three carriers of 4MHz each, whereas XM divides its spectrum into six carriers. As a result of these differences, XM and

187. Id.
188. Id.
189. Id. at 18–19.
190. See id. at F-21.
191. Sirius XM Memorandum Opinion and Order, supra note 3, at 12360.
192. Id.
193. Id.
194. See Sirius XM Consolidated Application, supra note 6.
196. Sirius XM Memorandum Opinion and Order, supra note 3, 12360.
198. SIRIUS INFORMATION REQUEST, supra note 195, at 38.
199. XM INFORMATION REQUEST, supra note 197, at 29.
Sirius receivers cannot receive programming from the other service.\textsuperscript{200}

2. The Proposed Sirius-XM Merger

On February 19, 2007, Sirius and XM entered into an Agreement and Plan of Merger.\textsuperscript{201} Sirius would absorb XM and become the surviving corporation, holding all the FCC licenses and authorizations for SDARS.\textsuperscript{202} The Application proposed that the merged entity would offer a variety of programming packages at lower prices than currently available from either company.\textsuperscript{203} The companies stated that they would offer four à la carte options, a "best of both" programming package, a "mostly news, sports and talk" package, a "mostly music" package, and a "family friendly" package at discounted prices, within three months after FCC approval of the transaction.\textsuperscript{204} Furthermore, both companies committed to set aside four percent of their full-time audio channels for noncommercial educational and informational programming, and another four percent to "qualified entities."\textsuperscript{205} They also proposed to not raise their rates for at least thirty-six months after the completion of the merger, to allow any manufacturer to develop equipment capable of delivering the radio service, and permit manufacturers to incorporate other technology into any satellite radio receiver (such as HD technology).\textsuperscript{206} Until the development of new technology, however, the merged entity is unlikely to convert to a common platform because of the differences in satellite infrastructure, transmission technology, and programming reception.\textsuperscript{207}

3. The FCC Ruling

The FCC found that the proposed transaction, along with the voluntary commitments made by XM and Sirius, would be in the public interest by making available to consumers more programming choices at various prices.\textsuperscript{208} In its Memorandum Opinion and Order, the FCC

\textsuperscript{200} See generally SIRIUS INFORMATION REQUEST, supra note 195, at 37; XM INFORMATION REQUEST, supra note 197, at 29.

\textsuperscript{201} Sirius XM Consolidated Application, supra note 6, at 6.

\textsuperscript{202} Sirius XM Memorandum Opinion and Order, supra note 3, at 12358.

\textsuperscript{203} Id.

\textsuperscript{204} Id. at 12359.

\textsuperscript{205} Id.

\textsuperscript{206} Id. Furthermore, Sirius and XM agreed to provide service to Puerto Rico, and committed that they would not bar others from including other audio technology in any device or vehicle.

\textsuperscript{207} SIRIUS INFORMATION REQUEST, supra note 195, at 41, 43–46.

\textsuperscript{208} Sirius XM Press Release, supra note 12.
stressed that absent the self-imposed constraints of XM and Sirius, the merger would result in a monopoly. Taking the worst-case scenario approach, the FCC shielded the decision from further review and took the first step towards creating new precedent, allowing FCC approved monopolies and further consolidation. The FCC assumed a worst-case scenario in its competitive analysis because the FCC found a lack of evidence in the record to predict the likelihood of anticompetitive harms. Incredibly, although the FCC found numerous potential harms under this scenario, XM’s and Sirius’ voluntary commitments were enough to mitigate the FCC’s concerns, convince the FCC to approve the monopoly, and even somehow categorize it as in the public interest.

The FCC was unable to define the product market and thus, under the worst-case scenario approach, labeled SDARS as a separate relevant product market. It noted that because there had been little-to-no price variation in XM and Sirius products ever since programming was offered to the public, it was impossible to use econometric rules to define the relevant markets and likely effects on price, as the FCC had been able to do in the EchoStar-DirecTV order. The FCC also stated that the information in various surveys that analyzed which products constituted the proper product market was flawed. The FCC assumed that the relevant geographic market was national, since both companies provide nationwide service. With these assumed markets, the FCC concluded that the merged firm would be able to increase SDARS prices over a non-transitory period of time. However, the FCC held that the price-cap condition eliminated any possible harms to consumers, and that the new programming packages would allow consumers to choose from more pricing choices. Despite the FCC’s determination that the new company would have potential vertical effects in the SDARS and SDARS-related equipment market, the Applicants’ voluntary commitments to permit any manufacturer to develop SDARS receivers, and to incorporate other technology in the receivers, ameliorated these concerns.

209. Id.
210. Sirius XM Memorandum Opinion and Order, supra note 3, at 12372–73.
211. Id. at 12367.
212. Id. at 12373.
213. Id. at 12376.
214. See id. at 12369–72.
215. Id. at 12373.
216. Sirius XM Memorandum Opinion and Order, supra note 3, at 12375.
217. Id.
218. Id. at 12379.
The Application listed many potential benefits to consumers: (1) more programming choices at lower prices;\textsuperscript{219} (2) more diverse programming;\textsuperscript{220} (3) accelerated deployment of advanced technology;\textsuperscript{221} (4) commercialization of interoperable radio receivers;\textsuperscript{222} and (5) operational efficiencies to safeguard the future of satellite radio.\textsuperscript{223}

The FCC agreed with XM and Sirius that the new packages they planned to offer would provide consumers with additional choices that would be priced lower than any of the Applicants' current, individual offerings.\textsuperscript{224} Even though the Applicants' proposed "best of both" package—which combines popular programs from both XM and Sirius—was priced higher than either of their current offerings, it cost less than subscribing to both services at once.\textsuperscript{225} The FCC found that the proposed à la carte programming would result in a clear public interest benefit as consumers would be able to tailor their programming to "match their individual tastes and interests."\textsuperscript{226} Finally, the FCC noted that the à la carte commitments functioned as additional safeguards against future price increases.\textsuperscript{227} Absent a merger, the FCC found that these benefits would not flow to the public because of the synergies and economies of scale created by the merger; thus, the newly merged company would enjoy cost advantages unable to occur absent the merger.\textsuperscript{228} Now, with these cost advantages from the merger, the FCC improperly assumes—or at least hopes—the new entity will be able to pass these cost benefits to consumers in the form of decreased pricing.\textsuperscript{229}

The FCC found speculative the evidence submitted by the Applicants that the merger would benefit the public by accelerating the deployment of advanced technology.\textsuperscript{230} The additional capacity needed for the deployment of such technology—such as real time traffic, rear seat video devices, and advanced data and telematics for traffic and weather—would not be available until after interoperable receivers were available.\textsuperscript{231}

\textsuperscript{219} Sirius XM Consolidated Application, \textit{supra} note 6, at 10–12.
\textsuperscript{220} Id. at 12–14.
\textsuperscript{221} Id. at 14–15.
\textsuperscript{222} Id. at 15–16.
\textsuperscript{223} Id. at 17–20.
\textsuperscript{224} Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12386.
\textsuperscript{225} Sirius XM Consolidated Application, \textit{supra} note 6, at 10–11.
\textsuperscript{226} Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12388.
\textsuperscript{227} Id. at 12389.
\textsuperscript{228} Id. at 12387–89.
\textsuperscript{229} Id. at 12388.
\textsuperscript{230} Id. at 12389–90.
\textsuperscript{231} Id.
The Applicants further claimed they would introduce a commercial interoperable satellite radio receiver. 232 However, the FCC’s rules already required the companies to make such a device. 233 In fact, when Sirius and XM originally received their SDARS licenses in 1997, the FCC required both companies to make an interoperable receiver that could access all licensed SDARS systems. 234 However, at the time of the merger application in 2007, neither Sirius nor XM made such a receiver. 235 Nevertheless, the FCC somehow accepted the companies’ excuses that they complied with the FCC order by merely designing an interoperable receiver and that they did not have to actually manufacture and bring one to the market. 236 Unfortunately, in its order allowing the merger, the FCC did not require Sirius XM to assure consumer availability of a receiver, and did not require that all receivers sold be interoperable. 237 The FCC also found that the public interest would be served because Sirius XM would be required to allow any third party to develop equipment to receive its satellite radio service. 238

Finally, the two companies claimed that the transaction would allow the merged entity to achieve operational efficiencies that would reduce costs, and that these cost savings would be passed on to subscribers in the form of lower subscription rates. 239 The Applicants cited efficiencies, such as reduced programming expenses through the elimination of duplicative staffing positions, reduced operational expenses associated with the broadcast and transmission of programming, reduced marketing and subscriber acquisition costs, reduced duplicative research and development efforts, and reduced general and administrative expenses. 240 However, the FCC found that the claimed efficiencies would only benefit consumers by a small percentage, and that not all of the benefits would flow to consumers. 241 For instance, some of the operational expenses and

232. Sirius XM Consolidated Application, supra note 6, at 15–16.
233. Sirius XM Memorandum Opinion and Order, supra note 3, at 12390; see also 47 C.F.R. § 25.144(a)(3)(iii).
234. See generally SDARS Rules, supra note 36, at 5795–98.
235. Sirius XM Consolidated Application, supra note 6, at 15–16.
236. See Sirius XM Memorandum Opinion and Order, supra note 3, at 12399.
237. Id. at 12401.
238. Id. at 12407. In doing so, Sirius XM must provide the intellectual property to third parties who wish to develop receivers. Such third parties may include other technologies such as HD radio, iPod ports, and Internet connectivity to further promote the public interest.
239. Sirius XM Consolidated Application, supra note 6, at 17–20.
240. Sirius XM Memorandum Opinion and Order, supra note 3, at 12391.
241. Id. at 12392–93.
economies of scale for equipment were not merger specific. Additionally, the companies did not provide sufficient evidentiary support to estimate a specific dollar amount that these claimed efficiencies would save the company. Indeed, some of these efficiencies could not be expected to occur until several years after the closing of the transaction. Thus, the FCC found the efficiencies too speculative, just as it had done in the EchoStar-DirecTV order.

When balancing the public interest harms against the benefits, the FCC not surprisingly found that the “harms outweigh the potential benefits.” However, it astonishingly found that “the presence of [the Applicants’] voluntary commitments mitigates the harms and ensures that benefits are realized.” The FCC noted that over time, the merged company would have an increased incentive and ability to raise prices above pre-merger levels; however, it inappropriately found that the voluntary price cap was sufficient to prevent such a likely harm. Not knowing how the market would respond in the years to come, the FCC at least minimally reserved the right to modify, remove, or extend the price cap.

The FCC also found that the commitment to provide leased channel-capacity to other programmers addressed the concern that a single provider of SDARS would harm program diversity. Specifically, the new company pledged four percent of its audio channels to be reserved for a “qualified entity” that will not be required to make any lease payments for the channels. Additionally, the merged entity will not be involved in the selection of the qualified entity nor will it have editorial control over the channels. Furthermore, another four percent of the channels will be reserved for noncommercial educational (NCE) use free of charge. The FCC unconvincingly found that such NCE use would serve the public

242. Id. at 12391.
243. Id. at 12391–92.
244. Id. at 12392.
245. Id. at 12393.
246. Sirius XM Memorandum Opinion and Order, supra note 3, at 12393.
247. Id.
248. See id. at 12394–95.
249. Id. at 12395.
250. Id. at 12410.
251. The companies defined a “Qualified Entity” as “any entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Native; or Hispanics.” Id. at 12409, n.437.
252. Sirius XM Memorandum Opinion and Order, supra note 3, at 12410.
253. Id. at 12414.
interest by maintaining a platform for diverse voices post-merger,\textsuperscript{254} despite this minimal allocation of channels.

Apparently, the FCC no longer feared that a single provider of a communicative service could raise the same concerns that it expressed when it denied the EchoStar-DirecTV merger. In the short run consumers may benefit from lower prices, greater programming availability, and increased channel diversity. However, in the long run these benefits are not indefinite.

IV. NEW PRECEDENT FROM FORGOTTEN POLICY

In the order approving the Sirius XM merger, the FCC could not have taken a more contradictory approach from its EchoStar-DirecTV denial, despite both merger applications similarly representing the only companies providing satellite service in their respective industries.\textsuperscript{255} The FCC found that in both instances, many of the public benefits were speculative and each company would be able to increase the price of its services, as both transactions would result in a monopoly.\textsuperscript{256} The FCC ignored its prior precedent of denying such a merger and disregarded the rules it set forth when it licensed spectrum for SDARS because it felt that a three-year price commitment made by Sirius XM would mitigate the monopolistic harms of the merger.\textsuperscript{257} These voluntary commitments were enough to tip the scale from an unallowable monopoly into a transaction meeting the statutory public interest test, as the conditions would allegedly prevent the monopolistic effects.\textsuperscript{258} However, historically, Sirius and XM have ignored FCC orders, making their commitment to follow the three-year price cap and other conditions suspicious.\textsuperscript{259}

A. The FCC Disregarded Its Prior Precedent and Rules

If the FCC allows voluntary commitments to convert an unacceptable merger into an FCC-approved entity, then it renders its analysis of relevant geographic and product markets meaningless. EchoStar and DirecTV each provided nationwide broadcast signals to subscribers who purchased a

\textsuperscript{254} Id. at 12411.
\textsuperscript{255} Id. at 12375–76.
\textsuperscript{256} See New EchoStar Memorandum Opinion and Order, supra note 75, at 20629; Sirius XM Memorandum Opinion and Order, supra note 3, at 12395.
\textsuperscript{257} Sirius XM Press Release, supra note 12.
\textsuperscript{258} Sirius XM Memorandum Opinion and Order, supra note 3, at 12352.
\textsuperscript{259} See infra Part IV.B.
special receiver and paid a monthly fee.\textsuperscript{260} Sirius and XM provided nationwide broadcast signals to subscribers who also purchased a receiver and paid a monthly fee.\textsuperscript{261} Nevertheless, in the EchoStar-DirecTV denial, the FCC rejected the Applicants' call for a national geographic market and instead ruled that the relevant geographic market was the local, individual household.\textsuperscript{262} In its Sirius XM Order, however, the FCC said the relevant market was national, as the broadcast signals reached across the whole nation.\textsuperscript{263} In the EchoStar-DirecTV denial, the FCC also stated that the relevant product market was broader than just the DBS market and included cable and other television providers.\textsuperscript{264} But in the Sirius XM Order, the FCC said the relevant product market consisted of only the satellite radio market comprised of XM and Sirius, rejecting other radio providers and audio devices.\textsuperscript{265} The FCC found that the EchoStar-DirecTV transaction would eliminate competitors in every market, leading to higher prices and lower service quality.\textsuperscript{266} On similar facts, the FCC found that the Sirius XM merger would also create a monopoly resulting in an imposition of higher costs placed on consumers.\textsuperscript{267} Nevertheless, the FCC failed to provide persuasive justification for this disparate treatment.\textsuperscript{268} By allowing XM and Sirius to impose self-restraints on prices to mitigate these harms, the market definitions analysis has taken a back seat to the new company's voluntary commitments, thus opening the door for future end-runs around merger analysis. Additionally, the conditions undermine the public interest standard set forth in sections 214 and 310 of the Communications Act, as it takes the potential harms of the merger and mischaracterizes them under the guise of public benefits, supporting mergers which do not deserve approval.

The FCC's major concerns, which led it to deny the EchoStar-DirecTV merger, included maintaining no fewer than two participants per service and the fear of allowing a single spectrum licensee to hold the entire available spectrum allocated to a service.\textsuperscript{269} Furthermore, the FCC found the public interest would be better served through competition

\textsuperscript{260} New EchoStar Memorandum Opinion and Order, \textit{supra} note 75, at 20609.
\textsuperscript{261} Sirius XM Consolidated Application, \textit{supra} note 6, at i, 3, 5.
\textsuperscript{262} New EchoStar Memorandum Opinion and Order, \textit{supra} note 75, at 20609–10.
\textsuperscript{263} Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12373.
\textsuperscript{264} New EchoStar Memorandum Opinion and Order, \textit{supra} note 75, at 20609.
\textsuperscript{265} Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12373.
\textsuperscript{266} New EchoStar Memorandum Opinion and Order, \textit{supra} note 75, 20620, 20626.
\textsuperscript{267} Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12394.
\textsuperscript{268} See id. at 12376.
\textsuperscript{269} See New EchoStar Memorandum Opinion and Order, \textit{supra} note 75, at 20626, 20662 (discussing the importance of competition in the market).
between two competitors, rather than having a single competitor subject to regulations. 270

The FCC Order that approved the Sirius XM transactions violated the FCC’s own policies and its past precedent set in the EchoStar-DirecTV denial. 271 Allowing the only two competing companies in an industry to merge, with that merger conditioned upon voluntary commitments, indirectly creates an FCC regulated monopoly that holds all available licenses to the applicable spectrum. 272 The FCC denied the 2002 EchoStar-DirecTV transaction largely due to its preference for competition, holding that allocating the spectrum to two companies that provide a given service ensures sufficient competition to promote the public interest. 273 Although it is easy to understand why companies would prefer to “escape the rigors of competition,” 274 it is unreasonable to assume consumers will be better off without it. 275 The recent FCC decision seems to be a government approved bailout of a financially struggling industry. 276 In fact, based on evidence presented in the Sirius XM merger application, both companies might have failed without the merger, so arguably the merger averts certain harms. 277 However, because the companies did not seek approval based on financial viability, the FCC should assume that the marketplace can support two financially viable satellite radio competitors. 278 By merging the only two existing satellite radio companies, competition in the market—the primary driver of innovation and progress—will no longer apply to satellite radio. Due to inadequate merger conditions, the decision better serves XM’s and Sirius’ interests rather than the public interest. 279

Furthermore, the FCC completely disregarded its established SDARS rules and policies promulgated in 1997, which expressed the FCC opinion

270. See id. at 20663.
271. See id. at 20626, 20662.
272. “The majority’s argument is that it can stack up enough ‘conditions’ on the merged entity—spectrum set-asides, price controls, manufacturing mandates, etc.—to tip the scale in favor of approval. In essence, the majority asserts that satellite radio consumers will be better served by a regulated monopoly than by marketplace competition.” Sirius XM Memorandum Opinion and Order, supra note 3, at 12443 (dissenting statement of Michael J. Copps, Comm’r).
274. Sirius XM Memorandum Opinion and Order, supra note 3, at 12444 (dissenting statement of Michael J. Copps, Comm’r).
275. Id.
277. Sirius XM Memorandum Opinion and Order, supra note 3, at 12444 (dissenting statement of Michael J. Copps, Comm’r).
278. Id.
279. Id. at 12450 (dissenting statement of Jonathan S. Adelstein, Comm’r).
that competition is beneficial for consumers.\textsuperscript{280} Even though both companies were forbidden from acquiring the license of the other company, Sirius and XM argued in their merger application that this rule was not binding, but rather a mere policy statement.\textsuperscript{281} The FCC correctly rejected this argument and instead held that it was a binding rule of substantive law.\textsuperscript{282} Yet, for the same reasons it concluded that the conditioned merger was in the public interest, the FCC inconceivably concluded that repealing the rule would serve the public interest as well.\textsuperscript{283} Clearly, no longer does "the public interest . . . include the protection of competition, [and] not competitors."\textsuperscript{284} The FCC expressed its concern that only competition could foster technological advances and better services and rates to consumers.\textsuperscript{285} Now, this concern has been eliminated with regulation in the form of voluntary conditions.\textsuperscript{286}

Moreover, approval of the merger violates the antitrust precedents mentioned in Section II(c) above. As demonstrated in \textit{FTC v. H.J. Heinz Co.}, the court found a Clayton Act violation when a monopoly emerged in markets where the possibility of a new entrant in the marketplace is difficult and improbable.\textsuperscript{287} Here, not only has the FCC determined that the merger (absent the conditions) constitutes a monopoly, but that the possibility of a future entrant into the satellite radio market is highly improbable as well.\textsuperscript{288} This will surely lead to a permanent monopoly which in no way fosters any competitive behavior. Additionally, the court denied the merger in \textit{FTC v. Staples} because Staples' largest and only rival in certain markets would be eliminated.\textsuperscript{289} Here, XM and Sirius are each other's only competition and post-merger surely will have no other satellite radio competitors.

Finally, the court in \textit{United States v. Franklin Electric} held "it would be odd if a merger of the kind at issue, from two producers to one, could be justified by either the efficiencies it would generate or because the

\begin{itemize}
\item \textsuperscript{280} See SDARS Rules, \textit{supra} note 36, at 5796 (stating rule promotes competition by reducing transaction costs and enhancing consumer choice).
\item \textsuperscript{281} Sirius XM Consolidated Application, \textit{supra} note 6, at 50.
\item \textsuperscript{282} Sirius XM Press Release, \textit{supra} note 12.
\item \textsuperscript{283} Id.
\item \textsuperscript{284} SDARS Rules, \textit{supra} note 36, at 5759.
\item \textsuperscript{285} Id. at 5786.
\item \textsuperscript{286} Sirius XM Press Release, \textit{supra} note 12.
\item \textsuperscript{288} See Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12373.
\item \textsuperscript{289} FTC v. Staples, 970 F. Supp. 1066, 1082 (D.D.C. 1997).
\end{itemize}
company to be acquired is failing.” 290 There, the claimed efficiencies were speculative and not supported by any evidence nor guaranteed to benefit consumers. 291 Here, the FCC determined that XM and Sirius’ proposed efficiencies were likewise speculative and would not result in a consumer benefit either. 292 Just as the court in Franklin Electric rejected the merger because it would have immediately changed a competitive market to a monopolized market, 293 the FCC here should have had the insight to reject this merger for the same reason. Although these cases are but a small amount of antitrust precedent, in no way has the FCC’s approval of Sirius XM promoted the ultimate antitrust law goals of promoting competition, increasing trade, and preventing unfair methods of competition.

Ironically, in 2005, Sirius’s General Counsel, Patrick Donnelly, stated “[t]he competition between the two companies is fantastic[—]there couldn’t be anything more American about it.” 294 This competition did not last much longer after the statement was made, and the competition for satellite radio services is now non-existent. Some proponents of the merger, including Sirius and XM, argue that intermodal competition between different audio platforms will be sufficient to discipline any possible anticompetitive abuse from the newly formed company. 295 However, such intermodal competition failed to protect consumers from price increases in the past. 296

B. Intermodal Competition Does Not Discipline Prices

Previous issues in the MVPD industry illustrate how intermodal competition failed to discipline rate increases. The Telecommunications Act of 1996 (Telecom Act) largely deregulated the cable industry in order to expand DBS services and to remove barriers for phone companies and other entrants wishing to enter the market. 297 The Telecom Act affected the doubling of monthly cable bills while decreasing competition through industry consolidation and market swapping. 298 Furthermore, competition

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291. Id.
293. Franklin Elec., 130 F. Supp. 2d at 1035.
295. See, e.g., Sirius XM Consolidated Application, supra note 6, at ii–iii.
296. See infra Part IV.B.
in the cable industry has been weak due to companies not expanding into the market as predicted by the makers of the Telecom Act.\(^{299}\)

The Telecom Act resulted in deregulation that created a monopolized cable industry where monopolists are able to push out competitors and raise subscription rates.\(^{300}\) The Telecom Act failed to promote cable competition and resulted in an ineffective system of price discipline.\(^{301}\) The effects of a single satellite radio service provider will be similar. It is misleading to believe that broadcast radio, digital Internet radio, and mobile devices, such as an iPod, will discipline prices any more than broadcast television, DVD players, digital video recorders, or DBS services have disciplined cable prices.\(^{302}\) For instance, in 2005, XM increased its basic subscription cost from $9.99 a year to $12.95 a year.\(^{303}\) Free terrestrial radio and iPods have been around since satellite radio launched, yet this did not prevent increases in satellite radio prices.\(^{304}\)

Competition in the audio market has grown to include AM/FM stations, news and talk radios, HD radio, mp3 players, and Internet radio.\(^{305}\) Satellite radio accounts for five percent of this marketplace.\(^{306}\) However, iPods, Internet radio, terrestrial radio, and HD radio are too dissimilar to satellite radio to influence satellite radio rates. For instance, terrestrial radio targets a local audience because it depends on local advertising for revenue. Consequently, this causes the radio station to adjust its content to the audience that the advertisers want to reach and that


\(^{300}\) See Wax, supra note 298, at 159.

\(^{301}\) See id.

\(^{302}\) See Sirius XM Consolidated Application, supra note 6, at 23–45 (arguing that satellite radio is a small part of a highly competitive and expanding market for audio entertainment, which will help regulate prices), but see Petition to Deny of Common Cause, Consumer Federation of America, Consumers Union and Free Press at 40–42, In re XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee: Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc., MB Docket No. 07-57 (2007) [hereinafter Petition to Deny] (arguing that satellite radio is in a distinct product market in which other forms of audio competition will not discipline prices).


\(^{304}\) Petition to Deny, supra note 302, at 41.

\(^{305}\) Sirius XM Memorandum Opinion and Order, supra note 3, at 12456 (statement of Robert M. McDowell, Comm'r).

\(^{306}\) Id.
the radio station can reach. Furthermore, terrestrial radio is subject to content regulation. Satellite radio, however, serves a national audience and offers more specialized and diverse programming regardless of where it is received. High Definition radio is subject to the same local market and regulates content similar to terrestrial radio. Furthermore, it is not commercial free, does not have a large range of channels in a variety of formats, and does not have exclusive programming available, such as sports games and radio talk shows. Storage devices, such as iPods, require that the consumer find and download the content and additionally lack the characteristics of satellite radio, such as being able to expose listeners to new content and giving the listener the sophistication of the DJ mixes. The iPod remains geared more towards downloaded music rather than live programming, such as sports and talk shows. Internet radio is also dissimilar to satellite radio in many ways: it is mainly a redistribution platform for terrestrial radio, it is inferior to satellite radio in quality, it is not available in automobiles, and it requires consumers to have access to broadband.

Even if these products were found to be substitutes to satellite radio, the FCC still states that the relevant product market does not include anything except satellite radio. Thus, it is presumptuous to assume that satellite radio competes for subscribers with these other services and that these above platforms will bring upon price discipline.

C. Flaws in the Voluntary Conditions

This merger grants Sirius XM increased market power that allows the post-merger monopoly to raise prices in the future when the price-freeze expires. If the two companies never merged, it is unrealistic to believe that prices would not have declined, as the companies would have remained in competition with each other. In fact, increased competition between the two companies could have led to the à la carte programming that Sirius XM

307. Petition to Deny, supra note 302, at 28.
308. Id.
309. See What is Sirius, supra note 2; What is XM, supra note 2.
311. Id.
312. Id. at 32–33.
313. Id. at 33.
314. Id. at 35.
315. Sirius XM Memorandum Opinion and Order, supra note 3, at 12373.
316. Id.
317. Petition to Deny, supra note 302, at 42.
now offers, and this competition could have driven subscription prices down to make subscribing to both Sirius and XM economically feasible for consumers.\textsuperscript{318} Additionally, the three-year price-freeze fails to compensate consumers for the cost increases they may have to pay when the freeze ends and competition in satellite radio will be entirely absent.\textsuperscript{319} Further, despite the voluntary price commitment, 

after the first anniversary of... the merger, the combined company may 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 performance of musical works and sound recordings or for device recording fees.\textsuperscript{320}

In other words, while the merger agreement may subject Sirius XM to price commitments now, the FCC specifically allows the combined entity to pass on certain cost increases to consumers after a year.\textsuperscript{321} The three-year price control would, therefore, prove to be illusory to the extent that consumers inevitably will bear these costs.\textsuperscript{322}

In addition to increased fees, consumers may experience lower quality programming.\textsuperscript{323} Experts disagree whether available technology would allow the companies to add more channels without diminishing audio quality.\textsuperscript{324} For instance, both companies are currently straining their transmission capabilities.\textsuperscript{325} This increased compression of transmission channels reduces the quality of audio output for the consumer.\textsuperscript{326} Therefore, even if Sirius XM could compress the data without compromising quality, this technological limitation would still require Sirius XM to upgrade the existing infrastructure—a cost likely borne by the consumers. However, such technology might not be available for many years.\textsuperscript{327}

\begin{itemize}
  \item \textsuperscript{318} Id. at 44.
  \item \textsuperscript{319} Id. at 42.
  \item \textsuperscript{320} Sirius XM Memorandum Opinion and Order, supra note 3, at 12394.
  \item \textsuperscript{321} Id.
  \item \textsuperscript{322} Id. at 12443 (dissenting statement of Michael J. Copps, Comm’r).
  \item \textsuperscript{323} Charles Babington, Radio Deal Could Face Technical Difficulties, WASH. POST, Mar. 19, 2007, at D1.
  \item \textsuperscript{324} Id.
  \item \textsuperscript{325} Id.
  \item \textsuperscript{326} Id.
  \item \textsuperscript{327} See The XM-Sirius Merger: Monopoly or Competition from New Technologies: Hearing Before the S. Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 110th Cong. 69 (2007) (statement on behalf of Common Cause, Consumers Union, The Consumer Federation of America, Free Press, Media Access Project, and
Over time, gradual price increases will have a dramatic adverse impact on consumers. In his dissenting statement of the merger, FCC Commissioner Michael J. Copps warned, "[t]he inescapable logic of the majority’s findings is that by 2011 satellite radio subscribers will face monopoly price hikes by a company with the incentive and ability to impose them. No one has been able to explain to me how this could possibly serve the public interest." Indeed, the FCC overlooked certain fees on the price-cap condition. Specifically, "equipment subsidies, ancillary services, activation fees, termination fees, and transfer fees" continue to undermine consumer protection, as consumers also bear these costs.

Furthermore, the FCC acknowledged its skepticism that there will be a competitive entrant into the satellite radio industry in the foreseeable future, as it is unlikely that any unencumbered spectrum will be available. Additionally, it will also take any potential entrant years to develop the necessary infrastructure and technology in order to become a viable competitor. Therefore, Sirius XM will possess unprecedented market power for at least that many years post-merger, and without consumer protections in place, Sirius XM may fail to act in the public interest when the price caps are eliminated.

The FCC’s merger approval will also lead to unfavorable terms for the people and industries that relied upon the competition between Sirius and XM for satellite radio related contracts. For instance, pre-merger, the companies competed with each other to sign long-term contracts with automakers, music and radio personalities, marquee programmers, and retail distributors. Sirius Chief Executive Officer, Mel Karmazin, stated to investors that post-merger, the “advertising line is going to contribute significantly in the future towards [average revenue per user].” Mr. Karmazin’s statement suggests that advertisers will face higher costs for

Prometheus Radio Project).

328. Petition to Deny, supra note 302, at 42.
329. Sirius XM Memorandum Report and Order, supra note 3, at 12443 (dissenting statement of Michael J. Copps, Comm’r).
330. Id. at 12446–47 (dissenting statement of Jonathan S. Adelstein, Comm’r).
331. Id. at 12418.
332. Id. at 12373.
advertisements and that consumers may have to listen to increased commercial content. Clearly, satellite radio consumers are not the only ones who will feel the negative impacts of the merger. The existence of a sole satellite radio company now eliminates any leverage that a person or group previously held in negotiating better contractual terms. Sirius XM not only has increased market power as the single provider of satellite radio, but now also as the single buyer of satellite radio content.

Finally, the provision that set aside four percent of Sirius XM’s channels for noncommercial education and information programming and another four percent to a Qualified Entity do not substantially add to what both services offered pre-merger. This eight percent of channels set aside is the equivalent of twenty-four total channels. As expressed by Senators John Kerry (D-MD), Claire McCaskill (D-MO), and Benjamin Cardin (D-MD), this allocation does not guarantee more diverse and informational programming, as XM and Sirius currently offer twelve such channels. The senators unsuccessfully urged the FCC to preserve anywhere between twenty to fifty percent of Sirius XM’s satellite capacity to such programming, as it would further strengthen the potential for enhanced minority programming. The order states, “we will determine the implementation details for use of these channels [for qualified entities] at a later date,” leaving it unclear how the FCC will choose these qualified entities. The FCC consistently claims that diversity programming is an important factor in the public interest framework. However, the FCC’s unpredictable test for choosing these entrants does not ensure an increase in diversity programming, but rather demonstrates the FCC’s willingness to bypass a cornerstone of its precedent in order to allow the merger.

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335. Id.

336. Petition to Deny, supra note 302, at 46 (noting that now that there is only one satellite radio company, Sirius XM will be able to increase prices for advertisements as well as contract on-air talent for cheaper than when there were two companies).


338. Id. at 12442 (statement of Kevin J. Martin, Chairman).


340. Id.

341. Sirius XM Memorandum Opinion and Order, supra note 3, at 12411.

342. Id.; see also 47 U.S.C. § 532(a) (2000).

noncommercial and qualified entities will have a negligible effect in offsetting the concentration of media that this transaction permits.\footnote{See id.}

\section*{D. Sirius and XM Refused to Follow Previous FCC Orders}

Sirius and XM argue that the merger is in the consumer interest because, for the first time ever, consumers will be able to get packages that include programming previously exclusive to each company.\footnote{Sirius XM Consolidated Application, \textit{supra} note 6, at 10–11.} However, because the two companies did not previously comply with FCC orders, the merged entity only offered this option to consumers after the merger.

According to the conditions that the FCC imposed when the SDARS providers received their initial licenses, both XM and Sirius had to develop an interoperable receiver that allowed those consumers who subscribed to both companies’ services to access both satellite radio services through a single piece of hardware.\footnote{SDARS Rules, \textit{supra} note 36, at 5797.} However, the companies insufficiently interpreted their commitment to create an interoperable radio, and instead simply designed an interoperable receiver, failing to actually manufacture and introduce one to the market.\footnote{Petition to Deny, \textit{supra} note 302, at 45.} Perhaps the companies feared that if they introduced an interoperable receiver to the market, then their subscribers could easily jump from one service to another.\footnote{See Pearlstein, \textit{supra} note 276.} As one commentator put it, Sirius and XM gave the FCC the option to give them a monopoly, or else consumers would not be able to listen to football games transmitted by one service and baseball games transmitted by the other service.\footnote{Id.} Because the companies did not comply with the interoperability requirement pre-merger, the companies created switching-costs for consumers that effectively limited pre-merger competition between the companies. Additional hardware costs involved with receiving the new service likely discouraged satellite radio consumers from switching services.\footnote{Sirius XM Memorandum Opinion and Order, \textit{supra} note 3, at 12449 (dissenting statement of Jonathan S. Adelstein, Comm’r).} Even three senators questioned Sirius XM’s ability to deliver an interoperable radio post-merger.\footnote{Letter to Kevin Martin, \textit{supra} note 338.} Yet, this previous failure to adhere to an FCC order is only one indication that Sirius XM will fail to comply with new FCC-imposed conditions.

The FCC repeatedly acknowledged XM’s and Sirius’s non-
compliance with FCC rules. For instance, the FCC started an inquiry into whether the FM modulator wireless transmitter on certain XM radios complied with emission limits and whether XM operated terrestrial repeaters without FCC approval. The extent of the latter violation was so great that the new company must either shut down or bring one hundred repeaters into compliance with FCC guidelines. These past violations, in addition to the companies’ failure to comply with the FCC’s interoperability order, make it unconvincing for the FCC and consumers to trust Sirius XM’s commitment to comply with the conditions of the merger. “[A]n applicant’s willingness to deceive the Commission on a material matter raises fundamental questions about whether the applicant can be relied upon on a going-forward basis.” A history of multiple violations should have undermined the FCC’s confidence to count on Sirius XM to deliver to consumers on its new promises.

V. CONCLUSION

On February 17, 2009, Sirius XM bonds valued at $175 million became due. Unable to finance this debt on its own, Sirius XM contemplated filing bankruptcy to restructure its debt until Liberty Media Corporation stepped in with a $530 million rescue package in the form of two separate loans. Liberty Media also owns a large stake in DBS provider DirecTV; therefore, the parties may integrate the satellite radio and satellite TV technologies to better serve consumers. However, the loan encompasses a fifteen percent interest rate with maturity dates set

353. Id. at 12423–24; XM Annual Report, supra note 4, at 19.
354. Sirius XM Memorandum Opinion and Order, supra note 3, at 12452 (statement of Deborah Taylor Tate, Comm’r).
356. See id.
359. Zimmerman, supra note 357.
for 2011 and 2012—\textsuperscript{361} an indication of the high risk posed by a company that has never turned a profit.\textsuperscript{362}

This financing also presents another interesting issue, as both Liberty Media and EchoStar competed to rescue Sirius XM.\textsuperscript{363} Liberty Media’s loan first consisted of $280 million to Sirius and then of $150 million to XM.\textsuperscript{364} The merged entity received two different loans, and two different companies offered to supply the capital needed for Sirius XM to remain financially viable.\textsuperscript{365} However, Sirius XM waited until the last minute to get this funding—the day both of the individual company’s debts were due. There is no reason why each company could not have engaged in talks with EchoStar or Liberty Media prior to initiating a merger. Indeed, both companies disclosed in their 10-K forms the high risk of their debt that would soon be due.\textsuperscript{366} Now, they are proverbially “having their cake and eating it too,” since Liberty Media, for the time being, has solved the merged entity’s financial problems, and the FCC gave it unprecedented control of the satellite radio industry.

The FCC’s public interest analysis of the Sirius XM merger was nothing but a utopian satellite radio dream. With over seventeen million subscribers since its inception in 2002, satellite radio is clearly a popular format.\textsuperscript{367} Perhaps with the addition of à la carte programming, the ability to receive programming from both Sirius and XM, and the possible synergies with DirecTV, the merged entity will further expand and finally become financially viable. These new developments would enable the merged entity to use its allotted spectrum to bring new services, features, and benefits to consumers. Realistically, the only true benefit that may flow to consumers from this transaction is that the FCC maintained the right to extend or modify the merger conditions.\textsuperscript{368}

For the first time in its history, the FCC allowed a single provider of a service to hold all available licenses for that particular service.\textsuperscript{369} Consumers will no longer benefit from the head-to-head competition between Sirius and XM, but rather must rely on Sirius XM to comply with

\begin{itemize}
\item \textsuperscript{361} See Davidoff, supra note 360; Sirius XM Current Report, supra note 358, at 1–4.
\item \textsuperscript{362} See Davidoff, supra note 360.
\item \textsuperscript{363} Goldsmith, supra note 358.
\item \textsuperscript{364} \textit{id}.
\item \textsuperscript{365} \textit{id}.
\item \textsuperscript{366} Sirius Annual Report, supra note 4, at 18; XM Annual Report, supra note 4, at 39.
\item \textsuperscript{367} See Sirius XM Memorandum Opinion and Order, supra note 3, at 12351; XM Annual Report, supra note 4, at 19.
\item \textsuperscript{368} Sirius XM Memorandum Opinion and Order, supra note 3, at 12445 (dissenting statement of Jonathan S. Adelstein, Comm’r).
\item \textsuperscript{369} \textit{id} at 12442.
\end{itemize}
the FCC-imposed merger conditions. Although Sirius XM will offer consumers more programming at cheaper prices for at least the first year after the merger, the future for consumers remains uncertain as both companies have a history of noncompliance with FCC rules, and Sirius XM will be able to pass certain costs on to subscribers after only one year.

Furthermore, this merger will open the door for future consolidation in the media industry, resulting in increased market power for newly merged companies. Since the FCC abolished its SDARS license acquisition rule, any future entrant (if able to receive any unencumbered spectrum or gain the capital for start up costs) may be bought out by Sirius XM, essentially creating a perpetual monopoly of satellite radio. Satellite radio started with noble beginnings, as the FCC believed this new programming format could drastically increase the public benefit through new technology and innovation. A decade later, the public interest no longer appears to be the FCC’s concern, as this merger merely replaced the public interest test with a private interest test at consumers’ expense.

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