Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, MARCH 24, 2008
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Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.

Evidence Does Not Establish that Combination of Satellite Radio Providers Would Substantially Reduce Competition

WASHINGTON — The Department of Justice's Antitrust Division issued the following statement today after announcing the closing of its investigation into the proposed merger of XM Satellite Radio Holdings Inc. with Sirius Satellite Radio Inc.:

"After a careful and thorough review of the proposed transaction, the Division concluded that the evidence does not demonstrate that the proposed merger of XM and Sirius is likely to substantially lessen competition, and that the transaction therefore is not likely to harm consumers. The Division reached this conclusion because the evidence did not show that the merger would enable the parties to profitably increase prices to satellite radio customers for several reasons, including: a lack of competition between the parties in important segments even without the merger; the competitive alternative services available to consumers; technological change that is expected to make those alternatives increasingly attractive over time; and efficiencies likely to flow from the transaction that could benefit consumers.

"The Division's investigation indicated that the parties are not likely to compete with respect to many segments of the satellite radio business even in the absence of the merger. Because customers must acquire equipment that is specialized to the satellite radio service to which they subscribe, and which cannot receive the other provider's signal, there has never been significant competition for customers who have already subscribed to one or the other service. For potential new subscribers, past competition has resulted in XM and Sirius entering long-term, sole-source contracts that provide incentives to all of the major auto manufacturers to install their radios in new vehicles. The car manufacturer channel accounts for a large and growing share of all satellite radio sales; yet, as a result of these contracts, there is not likely to be significant further competition between the parties for satellite radio equipment and service sold through this channel for many years. In the retail channel, where the parties likely would continue to compete to attract new subscribers absent the merger, the Division found that the evidence did not support defining a market limited to the two satellite radio firms that would exclude various alternative sources for audio entertainment, and similarly did not establish that the combined firm could profitably sustain an increased price to satellite radio consumers. Substantial cost savings likely to flow from the transaction also undermined any inference of competitive harm. Finally, the likely evolution of technology in the future, including the expected introduction in the next several years of mobile broadband Internet devices, made it even more unlikely that the transaction would harm consumers in the longer term. Accordingly, the Division has closed its investigation of the proposed merger."

ANALYSIS

During the course of its investigation, the Division reviewed millions of pages of documents, analyzed large amounts of data related to sales of satellite radios and subscriptions for satellite radio service, and interviewed scores of industry participants.

Extent of Likely Future Competition between XM and Sirius

The Division's analysis considered the extent to which the two satellite radio providers compete with one another. Although the firms in the past competed to attract new subscribers, there has never been significant competition between them for customers who have already subscribed to one or the other service and purchased the requisite equipment. Also, competition for new subscribers is likely to be substantially more limited in the future than it was in the past.

As to existing subscribers, the Division found that satellite radio equipment sold by each company is customized to each network and will not function with the other service. XM and Sirius made some efforts to develop an interoperable radio capable of receiving both sets of satellite signals. Depending on how such a radio would be configured, it could enable consumers to switch between providers without incurring the costs of new equipment. The Division's investigation revealed, however, that no such interoperable radio is on the market and that such a radio likely would not be introduced in the near term. For example, in the important automotive channel, such a radio could not be introduced in the near term due to the engineering required to integrate radios into new vehicles. The need for equipment customized to each network means that in order to switch from XM to Sirius, or vice versa, a subscriber would have to purchase new equipment designed for the other service. In the case of a factory-installed car radio, switching satellite radio providers would have the additional disadvantage of requiring an aftermarket radio that would be less integrated into the vehicle's systems. Data analyzed by the Division confirmed that subscribers rarely switch between XM and Sirius.

As to new subscribers, XM and Sirius sell satellite radios and service primarily through two distribution channels: (1) car manufacturers that install the equipment in new cars and (2) mass-market retailers that sell automobile aftermarket equipment and other stand-alone equipment. Car manufacturers account for an increasingly large portion of XM and Sirius sales, and the parties have focused more and more of their resources on attracting subscribers through the car manufacturer channel. Historically, XM and Sirius engaged in head-to-head competition for the right to distribute their products and services through each car company. As a result of this competitive process, XM and Sirius have provided car manufacturers with subsidies and other payments that indirectly reduce the equipment prices paid by car buyers to obtain a satellite radio. However, XM and Sirius have entered into sole-source contracts with all the major automobile manufacturers that fix the amount of these subsidies and other pertinent terms through 2012 or beyond. Moreover, there was no evidence that competition between XM or Sirius beyond the terms of these contracts would affect customers' choices of which car to buy. As a result, there is not likely to be significant competition between XM and Sirius for satellite radio equipment and service sold through the car manufacturer channel for many years.

The Division's investigation identified the mass-market retail channel as an arena in which XM and Sirius would compete with one another for the foreseeable future. Both XM and Sirius devote substantial effort and expense to attracting subscribers in this arena, with both companies offering discounts, most commonly in the form of equipment rebates, to attract consumers. Retail channel sales have dropped significantly since 2005, and the parties contended that the decline was accelerating. However, retail outlets still account for a large portion of the firms' sales, and the Division was unable to determine with any certainty that this channel would not continue to be important in the future.

Effect on Competition in the Retail Channel

Because XM and Sirius would no longer compete with one another in the retail channel following the merger, the Division examined what alternatives, if any, were available to consumers interested in purchasing satellite radio service, and specifically whether the relevant market was limited to the two satellite radio providers, such that their combination would create a monopoly. The parties contended that they compete with a variety of other sources of audio entertainment, including traditional AM/FM radio, HD Radio, MP3 players (e.g., iPods®), and audio offerings delivered through wireless telephones. Those options, used individually or in combination, offer many consumers attributes of satellite radio service that they may find attractive. The parties further contended that these audio entertainment alternatives were sufficient to prevent the merged company from profitably raising prices to consumers in the retail channel – for example, through less discounting of equipment prices, increased subscription prices, or reductions in the quality of equipment or service.

The Division found that evidence developed in the investigation did not support defining a market limited to the two satellite radio firms, and similarly did not establish that the combined firm could profitably sustain an increased price to satellite radio consumers. XM and Sirius seek to attract subscribers in a wide variety of ways, including by offering commercial-free music (with digital sound quality), exclusive programming (such as Howard Stern on Sirius and "Oprah & Friends" on XM), niche music formats, out-of-market sporting events, and a variety of news and talk formats in a service that is accessible nationwide. The variety of these offerings reflects an effort to attract consumers with highly differentiated interests and tastes. Thus, while the satellite radio offerings of XM and Sirius likely are the closest substitutes for some current or potential customers, the two offerings do not appear to be the closest substitutes for other current or potential customers. For example, a potential customer considering purchasing XM service primarily to listen to Major League Baseball games or one considering purchasing Sirius service primarily to listen to Howard Stern may not view the other satellite radio service, which lacks the desired content, as a particularly close substitute. Similarly, many customers buying radios in the retail channel are acquiring an additional receiver to add to an existing XM or Sirius subscription for their car radio, and these customers likely would not respond to a price increase by choosing a radio linked to the other satellite radio provider. The evidence did not demonstrate that the number of current or potential customers that view XM and Sirius as the closest alternatives is large enough to make a price increase profitable. Importantly in this regard, the parties do not appear to have the ability to identify and price discriminate against those actual or potential customers that view XM and Sirius as the closest substitutes.

Likely Efficiencies

To the extent there were some concern that the combined firm might be able profitably to increase prices in the mass-market retail channel, efficiencies flowing from the transaction likely would undermine any such concern. The Division's investigation confirmed that the parties are likely to realize significant variable and fixed cost savings through the merger. It was not possible to estimate the magnitude of the efficiencies with precision due to the lack of evidentiary support provided by XM and Sirius, and many of the efficiencies claimed by the parties were not credited or were discounted because they did not reflect improvements in economic welfare, could have been achieved without the proposed transaction, or were not likely to be realized within the next several years. Nevertheless, the Division estimated the likely variable cost savings – those savings most likely to be passed on to consumers in the form of lower prices – to be substantial. For example, the merger is likely to allow the parties to consolidate development, production and distribution efforts on a single line of radios and thereby eliminate duplicative costs and realize economies of scale. These efficiencies alone likely would be sufficient to undermine an inference of competitive harm.

Effect of Technological Change

Any inference of a competitive concern was further limited by the fact that a number of technology platforms are under development that are likely to offer new or improved alternatives to satellite radio. Most notable is the expected introduction within several years of next-generation wireless networks capable of streaming Internet radio to mobile devices. While it is difficult to predict which of these alternatives will be successful and the precise timing of their availability as an attractive alternative, a significant number of consumers in the future are likely to consider one or more of these platforms as an attractive alternative to satellite radio. The likely evolution of technology played an important role in the Division's assessment of competitive effects in the longer term because, for example, consumers are likely to have access to new alternatives, including mobile broadband Internet devices, by the time the current long-term contracts between the parties and car manufacturers expire.

The Division's Closing Statement Policy The Division provides this statement under its policy of issuing statements concerning the closing of investigations in appropriate cases. This statement is limited by the Division's obligation to protect the confidentiality of certain information obtained in its investigations. As in most of its investigations, the Division's evaluation has been highly fact-specific, and many of the relevant underlying facts are not public. Consequently, readers should not draw overly broad conclusions regarding how the Division is likely in the future to analyze other collaborations or activities, or transactions involving particular firms. Enforcement decisions are made on a case-by-case basis, and the analysis and conclusions discussed in this statement do not bind the Division in any future enforcement actions. Guidance on the Division's policy regarding closing statements is available at: http://www.usdoj.gov/atr/public/guidelines/201888.htm.

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