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Is Uncle Sam Serious About Sirius-XM?

By Randolph J. May

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Congress has scheduled another hearing, for April 17, on the proposed merger between Sirius Satellite Radio and XM Satellite Radio. Like all significant mergers, this one deserves scrutiny by the antitrust and regulatory authorities.

Congress legitimately has an oversight role as well.

But keep a keen eye: the way in which this merger is handled will tell much about whether our government officials grasp how dramatically communications and information-services markets are changing.

I am concerned that the Department of Justice antitrust officials and the Federal Communications Commission regulators charged with reviewing the merger do not adopt an unduly narrow view of marketplace competition.

A narrow view might lead them not only to reject the merger, but to maintain in place outdated regulations that have the effect of chilling innovation and stifling investment.

More about that in a moment, but first a few vital statistics about Sirius and XM. Together they offer about 300 channels of music, sports, talk, entertainment, traffic and weather, and other informational programming, many of them commercial-free.

The two operators currently have approximately 14 million subscribers. Despite having paid the government $170 million at auction to purchase the spectrum used to deliver their programming, and having invested billions since in facilities, programming and marketing, neither Sirius nor XM ever has turned a profit in five years of operation.

There are a number of alternatives in the audio services marketplace that consumers may substitute for satellite radio, especially in the face of any price hike.

In 2006 alone, they reported combined net losses approaching $2 billion. Sirius and XM contend that the operational efficiencies resulting from the merger will allow the combined company to provide consumers with more programming choices at lower prices, and more-advanced technological gizmos to boot.

The National Association of Broadcasters, which represents the terrestrial radio and television broadcasters and which has fought satellite radio from the days when it was little more than a dream, claims that satellite radio constitutes a discrete product market. Thus, in its view, a Sirius/XM combination would be a "merger to monopoly."

In typical Washington fashion, the NAB pleads that all it asks on behalf of local broadcasters--which, by the way, paid nothing to the government for the spectrum they use--"is for the opportunity to compete in today's digital marketplace."

Ah, there's the rub. There is a good argument that, in today's digital marketplace, the relevant market for purposes of assessing the merger's competitive impact is not the narrow satellite radio market, but rather a broader audio entertainment and information market. As UBS put it in an investment report: "The combination of an enhanced programming lineup with improved technology, distribution and financials will better position satellite radio to compete for consumers' attention and entertainment dollars against a host of products and services in the highly competitive and rapidly evolving audio entertainment marketplace: including free 'over the air' AM and FM radio, iPods, mobile phone streaming, HD Radio, Internet Radio, and next-generation wireless technologies."

A Merrill Lynch research report stated the merger could deliver greater content choice, offer improved technology and realize cost synergies--all of which could help satellite radio "remain competitive in the evolving audio entertainment landscape as it competes with terrestrial radio, Internet audio media, HD radio and portable music players."

In short, there are a number of alternatives in the audio services marketplace that consumers may substitute for satellite radio, especially in the face of any price hike.

Each year the FCC issues a report examining the status of video competition. In 2006, the commission concluded that "the market for the delivery of video programming services is served by a number of operators using a wide range of distribution technologies." The agency included in its competitive examination cable operators, satellite television operators, telephone companies now providing video service over their broadband facilities, wireless cable operators, Internet-based video services, and DVDs and videocassettes. It is difficult to understand why the full range of distribution technologies similarly would not be considered in assessing competition in the audio services market.

Some of the comments from those opposing the merger are baffling. For example, Scott Cleland, a communications industry analyst, claims that the spectrum granted to XM and Sirius "alone makes satellite radio a separate and distinct market for antitrust purposes."

While certain conditions attached to the use of spectrum may be relevant in assessing competitive impacts, simply using spectrum alone cannot be determinative for purposes of defining a relevant product market. Terrestrial radio and television broadcasters use spectrum. So too do satellite television and wireless cable operators. Even cable operators and Internet service providers often use spectrum as part of their network configurations. Few seriously contend that these providers each compete in separate markets because they use different frequencies.

What is most important now for sound communications policy is to move beyond classifying and regulating services based on the particular technology or slice of spectrum used for distributing the service. Whether evaluating the competitive impact of a particular merger or deciding whether to jettison archaic, unduly burdensome regulations devised during an earlier, generally monopolistic analog era, the important question should be: do consumers have reasonable alternative choices in the marketplace?

At bottom, it seems wrong to consider satellite radio a distinct market separate from the broader audio services marketplace. But my principal concern is not whether Sirius or XM are allowed to merge. It is that consumers continue to enjoy the widening array of information and entertainment choices that the digital revolution is enabling.

Increasing consumer choice depends on robust investment and innovation in new products and services. And robust investment and innovation ultimately depend on government officials appreciating that they should be wary of intervening in today's dynamic, increasingly competitive communications marketplace.

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