

# THE ASHCROFT GROUP, LLC

February 27, 2007

*Sent Via Fax*

The Honorable Alberto R. Gonzales  
Attorney General  
United States Department of Justice  
Robert F. Kennedy Building  
950 Pennsylvania Ave., NW  
Washington, DC 20530

## **Re: Proposed Merger between XM Satellite Radio and Sirius Satellite Radio**

Dear Attorney General Gonzales:

Thank you for your dedicated service to America. I am well aware of the weight of the responsibility that falls on your shoulders overseeing the quality and character of justice in America.

Please allow me on behalf of others, and myself, to raise several salient issues of significant, national importance regarding the recently proposed merger between XM Satellite Radio (XM) and Sirius Satellite Radio (Sirius). I do not express such reservations about potential mergers lightly. I understand that many valuable efficiencies may be achieved through lawful, competition-enhancing combinations.

In enforcing the federal antitrust laws, the Department of Justice has the difficult and critical task of determining whether the proposed merger of XM and Sirius would substantially lessen competition. Further, the Department must also resolve the question of whether the companies provide a service for which there is no adequate market substitute. The parties, based on the press reports, hope that the Department will define the market so broadly as to include all terrestrial radio and a number of nascent cutting-edge technologies – the potentials of which remain without full development and deployment. A close examination of the market reveals that Sirius and XM are the only two companies providing their product, which is nationwide mobile multi-channel audio content.

The most effective way to keep our markets free from unnecessary government regulations is to promote and ensure that vigorous competition is enhanced and fostered. In making enforcement judgments, the government should always be mindful that the ultimate objective of the antitrust laws is to maximize the value and benefit that enterprises offer to consumers. I would submit that a thorough study of consumer demands and preferences would show that terrestrial radio stations should not be considered part of the satellite radio market for the purposes of the review of the current merger because they are not providing substitute content -- content available in real time and available to consumers traveling market to market (not limited to a local market). Consumers, I believe, subscribe to satellite radio not because it comes from satellites rather than radio towers, but because it is a unique mobile multi-channel product with nationwide reach.

If these companies merge, no other entity can provide this content. In granting licensing authority for the existence of XM and Sirius, the Federal Communications Commission (FCC) made the wise decision of mandating that two such licenses operate in the 25 MHz spectrum range. Further, the FCC explicitly prohibited the two licensees from combining into a monopoly enterprise and stated, "Even after the DARS (digital audio radio service) licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license." To create now a monopoly for a single licensee is to create a unitary dominant player who would have both the incentive and ability to use monopoly rents to undermine competition in media and broadcasting.

As the Department examines the market definition for this transaction, may I suggest that the law should require discounting greatly the claimed future competition from proposed, untested, nascent technologies. When examining the two-year potential competitive impact of the proposed merger, I have real doubts that the new technologies are likely to become such adequate or effective market participants as to replace the competition lost in this merger of the only two satellite subscription radio providers. Although many people listen to music and books stored on digital music players, such content simply does not have the same range, organization and other features provided by subscription satellite radio.

It may be instructive to consider how the Department reacted to the proposed acquisition of Hughes Electronics Corporation by EchoStar Communications Corporation. That transaction would have reduced the number of competitors for many Americans from three to two, and in limited markets from two to one. The Department recognized that reducing competition from three to two was anticompetitive and opposed that transaction, which was eventually abandoned. A similar analysis should determine that the proposed Sirius/XM merger, which reduces the number of competitors from two to one, raises most serious competitive concerns.

Similarly, the FCC also opposed the EchoStar/DirectTV merger. In its merger order, the FCC reaffirmed the principal of not granting a single commercial spectrum licensee an exclusive spectrum monopoly stating, "The Applicants have cited no example where we have permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service." The prospect of XM and Sirius merging into a single licensee faces this same high hurdle.

Finally, it is worth considering the performance history of both Sirius and XM when reviewing the transaction for its compliance with the antitrust agreements. In 1997, XM and Sirius promised to work toward the creation of a single inter-operable receiver – a technology the availability of which would be in the conceded best interest of consumers and the companies. A decade later, no such receiver exists. Had either pursued the promise to reality, they both would have enjoyed broader consumer acceptance. The fact that neither delivered on this promise should be given significant weight if the Department considers entertaining any behavioral remedies designed to cure the serious anticompetitive impacts of the proposed merger.

It is my hope that these limited comments on several of the more apparent issues involved in this proposed transaction are useful to the Department. I hope to be able to write you additionally as consideration of this matter matures.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Ashcroft". The signature is fluid and cursive, with a long horizontal stroke at the end.

John Ashcroft

JDA/jgw