Brooklyn Journal of Corporate, Financial & Commercial Law

Volume 3 | Issue 2 Article 8

2009

Are You Sirius? The Mistake of Conditioning Approval of the Sirius-XM Merger on a Price Cap

Samuel J. Gordon

ARE YOU SIRIUS? THE MISTAKE OF CONDITIONING APPROVAL OF THE SIRIUS-XM MERGER ON A PRICE CAP

On July 25, 2008, in a 3–2 decision along party lines, the Federal Communications Commission (FCC or Commission) voted to give the government's final stamp of approval on the merger of Sirius Satellite Radio Inc. (Sirius) and XM Satellite Radio Holdings Inc. (XM) (collectively, the Applicants).[1] The $3.3 billion dollar merger "was one of the most protracted in U.S. history,"[2] not receiving approval until seventeen months after it was first proposed.[3] The merger combined "the only entities authorized by the Commission to provide satellite radio service in the United States,"[4] leaving just one satellite radio company, the newly merged Sirius XM Radio Inc.,[5] to control the satellite radio frequencies and provide services to over 18 million listeners.[6]

In reviewing a merger of communication companies, the FCC must determine whether or not the merger "will serve the public interest, convenience and necessity."[7] To determine whether the Sirius-XM merger was in the public interest, the FCC looked to define the relevant product and geographic markets but determined that there was insufficient evidence to do so.[8] Thereafter, the FCC weighed the potential harms and benefits of the merger under a "worst case scenario" assumption.[9] Although the Commission admitted that under such a scenario the merged entity would be a monopoly and have the "incentive and ability to raise the price of [satellite digital audio radio service (SDARS)],"[10] it determined that

---

1. Todd Shields, *Sirius Satellite Radio Received Clearance from FCC to Buy XM*, BLOOMBERG, July 26, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNVYmd3DlOfI. This followed the Department of Justice's (DOJ) approval of the merger. *See* Dep't of Justice, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holding Inc.'s Merger with Sirius Satellite Radio Inc.* (Mar. 24, 2008), http://www.usdoj.gov/opa/pr/2008/March/08_at_226.html [hereinafter DOJ Decision].

2. David Hayes, *Sirius – XM Merger's Approval Opens a New Batch of Questions*, KAN. CITY STAR, Aug. 17, 2008, at D1, *available at* 2008 WLNR 15499670.

3. Shields, *supra* note 1.

4. FCC, *In re Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, 22 F.C.C.R. 12,018, 12,018 (June 27, 2007) [hereinafter FCC Notice of Proposed Rulemaking].

5. *See* Google Finance, *SIRI – Sirius XM Radio Inc.*, http://finance.google.com/finance?q=NASDAQ:SIRI (last visited Oct. 3, 2008).

6. Kim Hart, *Satellite Radio Merger Approved*, WASH. POST, July 26, 2008, *available at* 2008 WLNR 13925502.

7. 47 C.F.R. § 25.119 (2004).

8. FCC, *In re Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, 25 (Aug. 5, 2008), http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-178A1.doc [hereinafter FCC Decision].

9. *Id.* at 25–26.

10. *Id.* at 28.

numerous voluntary commitments made by the Applicants, including a voluntary price cap, "ameliorate[d] possible harm to consumers"[11] and rendered the merger "in the public interest."[12]

This note will argue that given the inadequacies of price caps as a regulatory tool and the high levels of uncertainty regarding the boundaries of the SDARS market, the FCC erred in approving the Sirius-XM merger on this basis. Part I of this note will provide a background to the FCC's approval of the Sirius-XM merger, including information about the merging firms and the FCC's regulatory policy. Part II will argue that the FCC erred in its reliance on the voluntary price cap because price caps are ineffective, anti-competitive, and in this situation, a hindrance in light of the uncertainty problem existing in the SDARS market. Part III will advocate that when evaluating the merits of mergers between firms in markets whose boundaries cannot be defined ex ante, regulatory agencies should approve such mergers on the condition that their decisions be revisited following ex post evaluation of the merger's impact. Part IV will conclude this note with a summary of both the FCC's missteps in approving the Sirius-XM merger and how such errors can be avoided in the future.

I. BACKGROUND TO THE FCC'S APPROVAL

A. THE APPLICANTS

Before the merger, Sirius and XM were the sole FCC-licensed providers of satellite radio programming in the United States.[13] At the time, XM's subscriber base exceeded 9 million[14] and its programming consisted of over 170 channels, including 69 devoted to commercial-free music and others devoted to broadcasts of Major League Baseball, the National Hockey League, ESPN, CNN and CNBC, to name a few.[15] XM also provided services to automobiles through partnerships with automobile manufacturers, including deals with General Motors, Honda, Hyundai, Nissan, Porsche, Subaru, Suzuki, and Toyota.[16] Sirius had a subscriber base of over 8.5 million.[17] It offered the same number of commercial-free music stations as XM[18] and also had a lineup of other sports, news, talk, and

---

11. *Id.*
12. *Id.* at 26.
13. *See* XM Radio – Fast Facts, http://xmradio.com/about/fast-facts/index.xmc (last visited Sept. 28, 2008).
14. Includes only domestic subscribers on the date that the FCC approved the merger. *See* FCC Decision, *supra* note 8, at 6.
15. *Id* at 6–7.
16. XM Radio – Corporate Information, http://xmradio.com/about/corporate-information.xmc (last visited Sept. 28, 2008).
17. Sirius Satellite Radio Inc., Quarterly Report (Form 10-Q), at 6 (Mar. 31, 2008).
18. *See* FCC Decision, *supra* note 8, at 8–9; *see also* Sirius Satellite Radio – Corporate Overview, http://www.sirius.com/aboutus (last visited Sept. 28, 2008).

entertainment programming, featuring Howard Stern, Martha Stewart, the National Football League, the National Association of Stock Car Auto Racing, Maxim, ESPN, and coverage of numerous college sports teams.[19] Although both companies had been seeing strong subscriber and revenue growth, neither had ever turned a profit.[20] This disheartening reality likely contributed to their desire to merge.[21]

B. THE FCC'S INVOLVEMENT IN SATELLITE RADIO

The satellite radio industry is regulated by the FCC under the authority of the Communications Act of 1934 (the Act).[22] Under the Act, the FCC has the "sole power to allocate the electromagnetic spectrum, to establish general guidelines of operations and to grant licenses for use of the spectrum, which encompasses the entire range of electromagnetic frequencies transmitting sound, data, and video."[23] The FCC utilized this allocation authority on January 18, 1995, when it "allocate[d] spectrum in the 2310–2360 MHz band for [SDARS]."[24] Subsequently, on March 3, 1997, the FCC determined that it would auction all available spectrum designated for satellite radio in equal 12.5 MHz pieces to the two highest bidders.[25] A month later, the Commission announced that XM[26] and Sirius had been awarded the two SDARS licenses.[27]

The FCC established the satellite radio industry while simultaneously implementing antitrust safeguards.[28] Specifically, the FCC imposed two important restrictions on the transfer of SDARS licenses.[29] The first of these restrictions was the prohibition of "transfers or assignments of

---

19. FCC Decision, *supra* note 8, at 8–9; Sirius Satellite Radio – Corporate Overview, *supra* note 18.

20. David Ellis & Paul R. La Monica, *XM, Sirius Announce Merger*, http://money.cnn.com/2007/02/19/news/companies/xm_sirius/index (last visited Sept. 28, 2008).

21. Joel D. Corriero, Comment, *Satellite Radio Monopoly*, 33 DEL. J. CORP. L. 423, 424 (2008).

22. 47 U.S.C. § 151 (1996); Corriero, *supra* note 21, at 425.

23. Aurele Danoff, *"Raised Eyebrows" Over Satellite Radio: Has Pacifica Met its Match?*, 34 PEPP. L. REV. 743, 748 (2007).

24. FCC, *In re Amendment to the Commission's Rules With Regard to the Establishment and Regulation of New Digital Audio Radio Services*, 10 F.C.C.R. 2310, 2310 (Jan. 18, 1995).

25. *See* FCC, *In re Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 F.C.C.R. 5754 (Mar. 3, 1997) [hereinafter *Rules and Policies for the Digital Audio Radio Satellite Service*].

26. At the time, XM Satellite Radio Holdings Inc. was known as American Mobile Radio Corporation. XM Satellite Radio Holdings, Inc. – Company History, http://www.fundinguniverse.com/company-histories/XM-Satellite-Radio-Holdings-Inc-Company-History.html (last visited Dec. 19, 2008).

27. FCC Decision, *supra* note 8, at 6, 8 (*citing* FCC, *FCC Announces Auction Winners for Digital Audio Radio Service*, 12 F.C.C.R. 18,727, 18,727 (Apr. 2, 1997) [hereinafter *FCC Announces Auction Winners*]).

28. *Rules and Policies for the Digital Audio Radio Satellite Service*, *supra* note 25, at 5823–24.

29. *Id.* at 5823.

licenses except upon application to the Commission" and upon receiving the Commission's approval.[30] Such approval would only be granted upon a "demonstrat[ion] that the proposed transaction [would] serve the public interest, convenience, and necessity pursuant to [§] 310(d) of the Act."[31] The second restriction on transfers completely prohibited SDARS license holders from transferring their SDARS licenses to each other.[32] This restriction was implemented to "help assure sufficient continuing competition in the provision of [SDARS]."[33]

C. FCC'S REVIEW OF THE PROPOSED MERGER

Despite the above prohibition on mergers between them, XM and Sirius entered into an Agreement and Plan of Merger on February 19, 2007 and asked for the FCC's consent to transfer their respective SDARS licenses.[34] In order to reach a decision on the merger, the FCC had to address two questions. The first question concerned whether the 1997 rule prohibiting the two SDARS license holders from acquiring each other's license constituted a binding rule.[35] If the prohibition was binding, then the second question the FCC had to answer was whether to "waive, modify, or repeal the transfer prohibition" if it found that the merger met the Commission's standard of review.[36]

1. Standard of Review

The FCC's standard for reviewing mergers in the communications industry is articulated in § 310(d) of the Act.[37] This standard states that station licenses shall not be transferred "except . . . upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."[38] To such end, the FCC employs a balancing test, "weighing any potential public interest harms . . . against any potential public interest benefits."[39] Applicants bear the burden of proof under this

---

30. *Id.; See also* 47 C.F.R. § 25.119.

31. FCC Decision, *supra* note 8, at 5 (*citing* 47 U.S.C. § 310(d) (1996)).

32. *Rules and Policies for the Digital Audio Radio Satellite Service*, *supra* note 25, at 5823, *repealed by* FCC Decision, *supra* note 8, at 75–76.

33. FCC Decision, *supra* note 8, at 78.

34. *Id.* at 2–3, 11.

35. *Id.* at 14–15; *see also Rules and Policies for the Digital Audio Radio Satellite Service*, *supra* note 25, at 78, *repealed by* FCC Decision, *supra* note 8, at 75–76.

36. FCC Decision, *supra* note 8, at 15.

37. 47 U.S.C. § 310(d) (1996); FCC Decision, *supra* note 8, at 16–17.

38. 47 U.S.C. § 310(d). This standard differs from the standard of review used by the Antitrust Division of the DOJ, which the DOJ employed when it decided to close its investigation of the merger between XM and Sirius. *See generally* DOJ Decision, *supra* note 1. "The DOJ reviews communications mergers and transactions pursuant to [§] 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition in any line of commerce." FCC Decision, *supra* note 8, at 16 (*citing* 15 U.S.C. § 18 (1996)).

39. FCC Decision, *supra* note 8, at 17.

standard.[40] Therefore, Sirius and XM needed to prove, by a preponderance of the evidence, that the merger would, on balance, advance the public interest.[41]

In evaluating whether a merger is in the public interest, the FCC heavily considers whether competition in the relevant markets will be "preserv[ed] and enhanc[ed]."[42] The relevant product and geographic markets are the two markets evaluated to determine the horizontal effects of any merger.[43] These markets are typically delineated by the FCC in accordance with the Department of Justice (DOJ) and Federal Trade Commission's (FTC) *Horizontal Merger Guidelines* by use of the small but significant and nontransitory increase in price (SSNIP) test.[44] Under the SSNIP test, the relevant product market is defined as "the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose" a price increase.[45] Similarly, the relevant geographic market is defined 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[n] [SSNIP]."[46]

It is important to carefully define the product and geographic markets because horizontal mergers eliminate competition between the merging entities, in addition to reducing overall competition in the relevant markets.[47] Where competition is eliminated and higher concentrations of market power result, the public faces a real threat of price increases.[48] This threat arises from the fact that "[c]ompetition among firms indisputably creates powerful incentives for sellers to take steps to attract customers, most obviously by keeping prices low."[49] Without competitive pressure, the incentive to keep prices low will be diminished or completely eliminated.[50] The remaining firms will have more market power, giving them "the ability profitably to maintain prices above competitive levels for a significant

---

40. *Id*.

41. *Id*.

42. *Id.* at 17–18; *see also* 47 U.S.C. § 521(6) (1984) (One purpose of the statute, among others, is to "promote competition in cable communications and minimize unnecessary regulation"). The FCC also has a "deeply rooted preference for . . . accelerating private sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing the spectrum in the public interest." FCC Decision, *supra* note 8, at 17–18.

43. DOJ and FTC, *Horizontal Merger Guidelines*, rev. Apr. 8, 1997, §§ 1.1, 1.2, http://www.usdoj.gov/atr/public/guidelines/hmg.pdf [hereinafter *Horizontal Merger Guidelines*].

44. FCC Decision, *supra* note 8, at 20; *Horizontal Merger Guidelines*, *supra* note 43, §§ 1.1, 1.2 (emphasis removed).

45. FCC Decision, *supra* note 8, at 20 (*citing Horizontal Merger Guidelines*, *supra* note 43, § 1.11).

46. *Horizontal Merger Guidelines*, *supra* note 43, § 1.21.

47. FCC Decision, *supra* note 8, at 20.

48. *Id*.

49. Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 577 (2007).

50. *See generally Horizontal Merger Guidelines*, *supra* note 43, § 0.1.

period of time."[51] However, market power usually cannot be determined without first defining the boundaries of the markets themselves,[52] which is why defining the product and geographic markets is an important step.

2. The FCC's Conclusions

The FCC was asked to weigh conflicting opinions and evidence on the boundaries of the product market for SDARS.[53] The Applicants argued for a broad definition of the market, their contention being that satellite radio companies are in competition not just with other satellite radio companies but with other "audio entertainment services" as well, including "terrestrial radio, HD Radio, wireless phones, iPods and other MP3 players."[54] Commenters and petitioners who opposed the merger[55] argued "that SDARS constitutes a distinct relevant product market, separate from other audio entertainment services."[56]

After weighing the arguments made by both sides, the FCC determined that there was insufficient evidence "to delineate the boundaries of the relevant product market with any precision or confidence."[57] Moreover, the FCC was unable to conduct its own analysis of the relevant product market due to the fact that "there ha[d] been little or no variation in prices;" since the industry's launch, XM changed its price one time, Sirius never changed its price, and terrestrial radio has always been free of charge.[58] Consequently, "without knowing the contours of the relevant product market," it also became impossible for the FCC to determine the boundaries of the relevant geographic market.[59]

---

51. *Id.*

52. *Id.* at § 1.

53. FCC Decision, *supra* note 8, at 21–25.

54. *Id*. at 21.

55. Interested parties were permitted to "file petitions to deny, comments, or informal comments" with the FCC concerning the Sirius-XM merger "no later than July 9, 2007." Public Notice, FCC MB Docket No. 07-57 (June 8, 2007), http://www.fcc.gov/transaction/xm-sirius.html. Commenters who opposed the merger included the Consumer Coalition for Competition in Satellite Radio, the National Association of Broadcasters, American Women in Radio and Television, the National Association of Telecommunications Officers and Advisors, the American Antitrust Institute, Blue Sky Services, Entravision Communications Corporation, the Prometheus Radio Project, U.S. Senator Herb Kohl (Chairman of the Subcommittee on Antitrust, Competition Policy, and Consumer Rights), and U.S. Representatives James T. Walsh and John McHugh. FCC Decision, *supra* note 8, at 21 n.141.

56. FCC Decision, *supra* note 8, at 21.

57. *Id*. at 22. It did not help the FCC that the DOJ had not defined the relevant product market in its own analysis. *See* DOJ Decision, *supra* note 1. It also did not help that no commenters provided price estimates, cross-price elasticities of demand, or conclusive evidence that terrestrial radio is a substitute for SDARS. FCC Decision, *supra* note 8, at 21–24.

58. FCC Decision, *supra* note 8, at 22.

59. *Id*. at 25. The inability to determine the product market meant that it was impossible to determine the geographic market. This result can be seen in the following illustration: "[I]f the relevant product market were limited to SDARS, [the FCC] could define the relevant geographic market as a national market. In contrast, if the relevant product market were to include terrestrial

Without definitions of the product and geographic markets, the FCC was forced to assume a "worst-case scenario" in evaluating potential competitive harms.[60] This required assuming that SDARS constituted a distinct product market and that the United States constituted the geographic market.[61] Under this scenario, the FCC found that there were no potential entrants that could have reduced the merged entity's market power[62] and that "the proposed merger [was] a merger to monopoly" that would have "the incentive and ability to raise prices."[63] Other potential harms the FCC found were that the merger "would create a vertical monopoly in the manufacturing and distribution of satellite radio receivers"[64] and that it could "result in reduced programming diversity."[65]

Despite finding that these harms outweighed any potential benefits of the merger,[66] the FCC held that the merger was in the public interest because of voluntary commitments made by Sirius and XM.[67] First, to deal with the FCC's concern about reduced program diversity, Sirius and XM made voluntary commitments to offer new programming packages that would result in "greater consumer choice" and "two a la carte offerings to subscribers."[68] The FCC recognized both of these programming decisions as beneficial to the public interest.[69] Second, to deal with the FCC's concern that the merger "would create a vertical monopoly in the manufacturing and distribution of satellite radio receivers,"[70] Sirius and XM voluntarily committed to develop interoperable receivers,[71] and to "permit any device manufacturer to develop equipment that can deliver the combined entity's satellite radio service."[72] There were several additional

---

radio, [the FCC] would need to adopt a more localized relevant geographic market to reflect the fact that terrestrial radio stations have a limited reach." *Id.*

60. *Id*. at 25–26.

61. *Id*. at 26.

62. There were no potential entrants because the entire spectrum had already been distributed between Sirius and XM, it would have taken years for another company to build up the necessary infrastructure, and there were no "uncommitted entrants." *Id*. at 26–27. For a discussion about "uncommitted entrants," see *Horizontal Merger Guidelines*, *supra* note 43, § 1.32.

63. FCC Decision, *supra* note 8, at 27, 28.

64. *Id*. at 30. This vertical monopoly would adversely impact the public by giving the merged entity monopoly pricing power over SDARS receivers and would create "the potential of harming consumers by dampening innovation in the[ir] manufacture." *Id*. at 32.

65. *Id*. at 33–34.

66. *Id*. at 44–46.

67. *Id*. at 46.

68. *Id*. at 38–42.

69. FCC Decision, *supra* note 8, at 39, 41.

70. *Id*. at 30.

71. *Id*. at 56. An interoperable receiver would allow consumers to access both Sirius and XM's SDARS systems from a single receiver instead of needing a separate receiver for each system. *See id*. at 50.

72. *Id*. at 59.

voluntary commitments made by Sirius and XM,[73] but the commitment most significant to the FCC's decision to approve the merger was the price cap.

To address concerns about potential price increases to consumers, Sirius and XM voluntarily committed not to raise retail prices for thirty-six months.[74] The FCC concluded that this commitment would "mitigate the harm from any post-merger price increases," but it wanted additional protections.[75] Thus, the FCC accepted the Applicants' price cap commitment but also retained the authority to evaluate the price cap six months prior to its expiration to determine if it should be "modified, removed, or extended."[76] In addition, the FCC mandated that the Applicants would not be permitted to adjust the number of channels in any of their current packages during the three-year price cap period.[77]

After finding that the voluntary commitments made by the Applicants tipped the balance of harms and benefits toward the latter, the FCC turned its attention to the legality of the merger.[78] When the FCC established the rules and policies for the SDARS industry in 1997, in order to "help assure sufficient continuing competition in the provision of [SDARS]," the FCC devised a rule which stated, "[e]ven after [SDARS] licenses are granted, one licensee will not be permitted to acquire control of the other remaining [SDARS] license."[79] The FCC sought comment as to whether this language constituted a binding rule and, if so, whether it should be "waive[d], modif[ied], or repeal[ed] . . . in the event that the Commission determine[d] that the proposed merger, on balance, would serve the public interest."[80] While the Commission concluded that the rule was in fact binding, the Commission also made the decision to repeal the rule since the public interest would be served.[81]

II. THE MISTAKE OF RELYING ON A VOLUNTARY PRICE CAP

The merits of price cap commitments have been hotly contested by U.S. antitrust regulatory authorities as of late. While the FCC has rejected the

73. Sirius and XM made additional voluntary commitments to allow third party access to SDARS capacity, to reserve channels for noncommercial use, and to provide service to Puerto Rico. *Id*. at 60–68.

74. This commitment applies to the basic $12.95 per month subscription package and the a la carte programming package, among others. *Id*. at 47.

75. FCC Decision, *supra* note 8, at 48.

76. *Id*.

77. *Id*.

78. *Id*. at 73–79.

79. *Rules and Policies for the Digital Audio Radio Satellite Service*, *supra* note 25, at 5823, *repealed by* FCC Decision, *supra* note 8, at 75–76.

80. FCC Notice of Proposed Rulemaking, *supra* note 4, at 12,018.

81. FCC Decision, *supra* note 8, at 73–76.

use of pricing plans as recently as 2002[82] and the legality of instituting such plans has been doubted,[83] price cap commitments were embraced by the FCC in a more recent decision as a way of curbing the potential anti-competitive effects of mergers on pricing.[84] On the other hand, the DOJ and FTC have vehemently opposed the use of post-merger price regulations.[85] Whether or not there is sufficient justification for the implementation of voluntary price caps in general, in the specific setting of the Sirius-XM merger, it is clear that the arguments against the post-merger price regulation far outweigh the potential public interest benefits found by the members of the FCC.

A serious uncertainty problem exists in the SDARS industry: there is insufficient data to determine the boundaries of the product and geographic markets.[86] Commenters submitted arguments for and against the merger but neither side could provide conclusive evidence as to the exact market boundaries.[87] It did not help that throughout their combined histories, Sirius and XM changed their retail prices a grand total of one time, making it impossible to estimate the elasticities of demand required to define the markets.[88] Thus, the FCC's decision to rely on the Applicants' voluntary price cap has three main flaws: (1) price caps have proven to be ineffective; (2) price caps are anti-competitive; and (3) in this situation, the price cap eliminated the FCC's ability to resolve the uncertainty problem that the SDARS industry faces.

A. Ineffectiveness of the Price Cap

The price cap proposed by the Applicants and accepted by the FCC creates a 36-month period during which the Applicants cannot raise their

---

82. *See* FCC, *In re Application of EchoStar Communications Corporation, (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, 17 F.C.C.R. 20,559, 20,663 (2002) [hereinafter *EchoStar*].

83. *See* Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, 3 J. COMPETITION L. & ECON. 471, 484–90 (2007) (arguing that price regulation through consent decree may be unlawful because there is no clear legislative authority to do so and that it also might be an unconstitutional violation of the separation of powers); *see also* J. Gregory Sidak & Hal J. Singer, *Evaluating Market Power with Two-Sided Demand and Preemptive Offers to Dissipate Monopoly Rent: Lessons for High-Technology Industries from the Antitrust Division's Approval of the XM-Sirius Satellite Radio Merger*, 4 J. COMPETITION L. & ECON. 697, 748–49 (2008) (stating that "Congress has not delegated to the FCC the power to regulate SDARS rates, and no delegation can be inferred").

84. *See* FCC, *In re AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, 22 F.C.C.R. 5662, 5807–08 (2007) (the FCC accepted the voluntary commitment made by AT&T and BellSouth to offer a fixed $10 price per month for DSL service to new customers and to continue that policy for 30 months).

85. *See* discussion *infra* Part II.B.

86. FCC Decision, *supra* note 8, at 22, 25.

87. *Id.* at 20–25. Public comments regarding the merger were filed pursuant to the FCC's Public Notice of June 8, 2007, *supra* note 55.

88. FCC Decision, *supra* note 8, at 21–22.

prices on some specifically enumerated programming packages.[89] History shows that this regulation will prove to be ineffective during this 36-month period because (1) the price cap fails to account for non-retail pricing, and (2) Sirius-XM will have an incentive to reduce its programming quality. In addition, the price cap will fail to effectively prevent monopoly pricing behavior since the Applicants will have the ability to raise prices once the price cap expires.

1. Not All Pricing Elements Were Taken Into Account

One of the shortcomings of the price cap is that it "suffers from a myopic perception of satellite radio pricing."[90] The voluntary commitment to cap retail prices applies to several explicitly enumerated programming packages.[91] What it fails to account for, however, are the numerous other "implicit pricing elements of the service, such as equipment subsidies, ancillary services, activations fees, terminations fee, and transfer fees"[92] (Implicit Pricing Elements). As a result, the Applicants can simply raise the prices they currently charge for these Implicit Pricing Elements to compensate for their inability to price-gouge consumers on retail pricing.[93] For example, Sirius currently charges a retail fee of $12.95 per month[94] and an activation fee of $15.00.[95] In this example, Sirius decides that, with the monopoly power it obtained in the merger with XM, it would like to increase retail prices from $12.95 per month to $13.95 per month; however, the retail price cap implemented by the FCC prevents Sirius from doing so. Despite the cap, Sirius would still be able to gouge its consumers for the extra $1.00 per month. Sirius could do so simply by increasing its uncapped one-time activation fee from $15.00 to $27.00, thus realizing the same $12.00 gain that year as it would have if the price cap had not prevented it from raising its monthly retail price. The failure to cap activation fees and the other Implicit Pricing Elements in conjunction with the cap on retail prices thus "undermine[s] the consumer protection intent of the price cap"[96] and the FCC's entire premise for approving the merger.

---

89. This list includes their "per month subscription package, their a la carte programming package, their 'best of both' programming packages, their 'mostly music' and their 'news, sports, and talk' programming packages, and their discounted family-friendly programming package." *Id*. at 47.

90. *Id.* at 99 (Adelstein, Comm'r, dissenting).

91. *Id.* at 47.

92. *Id*. at 99–100 (Adelstein, Comm'r, dissenting); *see also* Sidak & Singer, *supra* note 83, at 746, 751.

93. FCC Decision, *supra* note 8, at 99–100 (Adelstein, Comm'r, dissenting); Sidak & Singer, *supra* note 83, at 746.

94. FCC Decision, *supra* note 8, at 47.

95. Sirius Terms and Conditions, http://shop.sirius.com (last visited Dec. 21, 2008).

96. FCC Decision, *supra* note 8, at 99–100 (Adelstein, Comm'r, dissenting).

2. Decrease in Quality of Programming is a Likely Result

As was previously noted, the voluntary commitment consists of an agreement not to raise the prices on specifically enumerated programming packages,[97] and the Applicants also cannot change the number of channels in any of these packages.[98] These regulations, however, do nothing to inhibit the Applicants' ability to reduce the quality of their programming packages by increasing advertising or by moving popular shows to uncapped packages for which they could charge more money. The Chief Executive Officer of Sirius, Mel Karmazin, has already stated that "the advertising line is going to contribute significantly in the future towards [average revenue per user],"[99] hinting that increased advertising is on the way. The DOJ has come out against the use of conduct remedies[100] specifically for this very reason, stating:

> Conduct remedies suffer from at least four potential substantial costs that a structural remedy can in principle avoid . . . [for instance], there are the indirect costs associated with efforts by the merged firm to evade the remedy's "spirit" while not violating its letter. As one example, a requirement that the merged firm not raise price may lead it profitably, and inefficiently, to reduce its costs by cutting back on quality — thereby effecting an anticompetitive increase in the "quality adjusted" price.[101]

An illustration of the adverse impact that pricing regulations can have on product quality can be seen in the ongoing regulatory debate concerning a la carte pricing of television networks on cable and satellite systems.[102] Generally, consumers of television programming advocate a la carte pricing policies because they believe that they will benefit from only having to pay for the channels that they watch.[103] Nevertheless, the customary practice for television providers is to sell channels together in bundles.[104] Research has shown, despite conventional wisdom, that when a la carte rate regulations were imposed on cable TV systems, consumers actually suffered rather than benefited because "cable operators and cable networks responded to these

---

97. *Id*. at 47.

98. *Id*. at 48.

99. Sirius Satellite Radio Inc. & XM Satellite Radio Holdings Inc., Transcript of Investor Conference Call (Feb. 20, 2007), http://www.sec.gov/Archives/edgar/data/908937/000095012307002469/y30604be425.htm.

100. Conduct remedies "entail[] injunctive provisions that would, in effect, manage or regulate the merged firm's postmerger business conduct." DOJ, Antitrust Div., *Antitrust Division Policy Guide to Merger Remedies*, Part III (Oct. 2004), http://www.usdoj.gov/atr/public/guidelines/205108.pdf [hereinafter *Policy Guide to Merger Remedies*].

101. *Id.* at Part III.A.

102. Sirius and XM have also voluntarily committed to implement an à la carte policy for SDARS as part of the merger agreement. FCC Decision, *supra* note 8, at 47.

103. Thomas W. Hazlett, *Shredding Tiers for A La Carte? An Economic Analysis of Cable TV Pricing*, 5 J. TELECOMM. & HIGH TECH. L. 253, 257 (2006).

104. *Id*. at 262.

constraints by altering the nature, packaging, and quality of video programming services."[105] These same adverse consequences can reasonably be expected from the price caps on Sirius XM Radio Inc.'s programming packages.

3. Prices Will Rise When the Price Cap Expires

There is yet another question which the 36-month price cap on the Applicants' programming packages fails to address: what happens after the cap expires? It is true that the FCC implemented some precautionary measures concerning the cap, such as retaining the authority to evaluate the price cap six months prior to its expiration to determine if it should be "modified, removed, or extended,"[106] yet there is nothing to prevent the Applicants from raising prices once the price cap expires. The cap can be easily overcome, as it literally tells the Applicants on which day they can increase their retail prices. Furthermore, considering that there are no potential entrants into the market,[107] there will be no competitive forces to naturally prevent Sirius XM Radio Inc. from raising its prices.[108]

B. PRICE CAPS ARE ANTI-COMPETITIVE

By approving the merger of Sirius and XM in reliance on a price cap, the FCC majority "assert[ed] that satellite radio consumers will be better served by a regulated monopoly than by marketplace competition."[109] Such a ruling "is antithetical to the deregulatory movement at the FCC over the past decade"[110] and its governing law,[111] which advocate competition over regulation.

In 2002, the FCC received an application from EchoStar Communications Corporation (EchoStar), General Motors Corporation (GM), and Hughes Electronics Corporation (Hughes), collectively, "to transfer control of various Commission authorizations, including direct broadcast satellite (DBS)," to New EchoStar.[112] It was in this opinion that the FCC stated its policy that market competition is preferable to regulated

---

105. *Id*. at 258.
106. FCC Decision, *supra* note 8, at 48.
107. *Id.* at 26–27.
108. Market entrants are recognized as having the ability to impact post-merger prices. Thus, if the possibility existed for new firms to enter the SDARS market, then the possibility would have remained open that firms could enter the market and prevent Sirius-XM, via the forces of competition, from raising its prices after the expiration of the price cap. *See Horizontal Merger Guidelines*, *supra* note 43, § 3.0.
109. FCC Decision, *supra* note 8, at 96 (Copps, Comm'r, dissenting).
110. Sidak & Singer, *supra* note 83, at 746.
111. 47 U.S.C. § 521(6).
112. *EchoStar*, *supra* note 82, at 20,561. New EchoStar would provide DBS services under the name DirecTV. *Id*.

monopolies.[113] As in the Sirius-XM merger, the EchoStar merger was a merger that would combine the two largest providers of the service into a single entity.[114] Another parallel to the Sirius-XM merger was the concern that if the merger was approved, the newly merged entity, New EchoStar, would be able to raise prices as a result of increased market power.[115] Particularly, it was feared that New EchoStar "would be able to raise prices and exploit its dominant position in geographic regions not served by cable systems."[116] To combat these concerns, EchoStar, GM, and Hughes "promise[d] to remedy the merger's potential anticompetitive effects in areas not served by cable competitors with a 'national pricing plan.'"[117]

Unlike the FCC of 2008, the FCC of 2002 rejected the proposed "national pricing plan" as inconsistent with the goals of the FCC. In its holding, the Commission stated its clear preference for competition over regulation:

> In essence, what Applicants propose is that we approve the replacement of viable facilities-based competition with regulation. This can hardly be said to be consistent with either the Communications Act or with contemporary regulatory policy and goals, all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare in communications markets served by a single provider, with free market competition, and particularly with facilities-based competition. Simply stated, the Applicants' proposed remedy is the antithesis of the 1996 Act's "pro-competitive, de-regulatory" policy direction.[118]

The FTC and DOJ have similarly objected to the practice of allowing mergers based on assurances that the merging companies will not raise prices. Their objections rest "on the grounds that . . . competition is the proper driving force for policy decisions."[119] They believe that "community commitments are an ineffective short-term regulatory approach to what is ultimately a problem of competition."[120] Clearly then, the decision of the FCC to opt in favor of a regulated monopolist, Sirius XM Radio Inc., over the continued market competition between Sirius and XM, is irreconcilable with the policies of the FCC, FTC, and DOJ.

---

113. FCC Decision, *supra* note 8, at 96–97 (Copps, Comm'r, dissenting).
114. *EchoStar*, *supra* note 82, at 20,561; FCC Notice of Proposed Rulemaking, *supra* note 4, at 12,018.
115. *EchoStar*, *supra* note 82, at 20,626.
116. *Id.*
117. *Id.* at 20,579.
118. *Id.* at 20,663 (emphasis removed).
119. Mary Lou Steptoe & David Balto, *Finding the Right Prescription: The FTC's Use of Innovative Merger Remedies*, 10 ANTITRUST 16 (1995).
120. FTC, *Improving Health Care: A Dose of Competition*, 2004 WL 1685795 (July 2004).

C. THE UNCERTAINTY PROBLEM

1. Definition of an Uncertainty Problem and How it is Remedied

Regulatory authorities often make decisions about competition policy in the face of uncertainty.[121] Uncertainty is created by the fact that in many situations, there is simply no way to predict the future impact of implemented policies.[122] When such uncertainty exists, enforcement of regulatory policies has a certain experimental character that makes the manner in which remedies are implemented especially important.[123]

When an administrative agency has determined that certain conduct should be regulated, there are two methods available to it to enforce its standards: ex ante and ex post.[124] Under an ex ante enforcement mechanism, the administrative agency reviews and must either reject or provide preapproval or preclearance for the conduct.[125] By contrast, ex post enforcement involves an evaluation of the conduct after the fact rather than before it transpires.[126]

The ex ante approach to regulation faces serious disadvantages when uncertainty problems exist in comparison to the ex post approach.[127] Since ex ante regulation "requires agencies to make enforcement decisions before the regulated activity has occurred," regulatory agencies may be forced to make predictions about future conduct based on "a limited, sometimes inadequate record."[128] The regulatory agencies may also be forced to rely on the applicant's own description of its proposed conduct in order to predict the impact of the conduct.[129] This suggests that "in contexts where a complete record may be especially helpful (or necessary) in identifying violations or determining their nature or severity," as when considering whether a merger will be anticompetitive, "ex ante enforcement may be inadvisable."[130] Thus, in the face of uncertainty problems, "waiting to see what happens, i.e., relying on ex post enforcement, may be the least costly and error-prone alternative."[131]

---

121. William E. Kovacic, *Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy*, 9 GEO. MASON L. REV. 843, 844 (2001).
122. *Id*.
123. *Id*.
124. Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1278 (1999).
125. *Id*. at 1282–83.
126. *Id*. at 1281–82.
127. *Id*. at 1319.
128. *Id*.
129. *Id*.
130. Bhagwat, *supra* note 124, at 1319.
131. *Id*.

Despite the advantages of ex post enforcement in the face of uncertainty, the FCC is required by law to preassess transfers of radio license control to make sure that the transfer "will serve the public interest, convenience and necessity."[132] Since the FCC cannot wait to take ex post action, the next best option for dealing with uncertainty problems is to conduct ex post monitoring "to determine whether the assumptions and hypotheses that motivated the decision[s] . . . were sound."[133]

Research and ex post testing of the decisions made by regulatory authorities are essential in contexts characterized by uncertainty.[134] The development of sound government policy that can sufficiently protect the interests of the public depends on generating knowledge concerning the "wisdom of choices past," as it will lead to a better "[u]nderstanding [of] the effects of previous government initiatives" and allow agencies to gain "valuable insights about designing future policies."[135] These studies can reduce the uncertainty of future decisions by "illuminating the accuracy of various theories in diagnosing business conduct or predicting competitive effects and informing judgments about the impact of various remedies."[136]

Studies conducted by the FTC's Bureau of Economics (Bureau), which were ex post assessments of several government regulations, are illustrative examples of how ex post assessments of regulatory decisions can lead to better policies.[137] One such study was conducted by the Bureau after Congress passed the Nutrition Education and Labeling Act of 1990 (NLEA).[138] The NLEA allowed companies to make some health claims on product labels and advertisements but prohibited many others about promising scientific findings, "even when the downside risk from consuming foods based on the claims was negligible and the manufacturer accurately portrayed the level of scientific support for the claims."[139] The Bureau investigated the impact of this regulation and found that it negatively impacted the public by "stifl[ing] the flow of health information to consumers" and by "result[ing] in significantly less information about nutrition and health attributes in advertising."[140] Another of the Bureau's studies was conducted to test new mortgage disclosure requirements proposed by the U.S. Department of Housing and Urban Development (HUD).[141] The study found that the requirements would cost consumers

132. 47 C.F.R. § 25.119.
133. Kovacic, *supra* note 121, at 846.
134. *Id.* at 856.
135. *Id.* at 843. *See also* Luke Froeb, Daniel Hosken & Janis Pappalardo, *Economics Research at the FTC: Information, Retrospectives, and Retailing*, 25 REV. INDUS. ORG. 353, 370–71 (2004).
136. Kovacic, *supra* note 121, at 846–47.
137. *See* Froeb, Hosken & Pappalardo, *supra* note 135, at 355–61.
138. *Id.* at 357.
139. *Id.* at 357–58.
140. *Id.* at 358.
141. *Id.* at 360.

millions of dollars per year because more people had difficulty determining the price of loans when the mortgage forms contained the disclosures.[142]

The Bureau's ex post assessments of the FDA and HUD policies showed the beneficial impact that research can have on regulatory decisions made in uncertain situations. Neither agency knew how their regulatory policies would impact the public, but the Bureau's studies provided evidence on the consequences of the policies.[143] As a result of the Bureau's investigations, the FDA adjusted its policies on health claims in advertising,[144] and HUD took its proposal to increase mortgage disclosures off the table.[145]

The importance of conducting research to remedy uncertainty problems in antitrust merger policy is especially pronounced.[146] Ex post assessments are viewed as "essential to effective government policy"[147] when it comes to competition, particularly in the face of technological change.[148] These assessments "allow us to sharpen our understanding of which mergers are likely (and unlikely) to be anticompetitive."[149] One prerequisite to conducting ex post assessments of antitrust merger decisions, though, is the need for data in order to conduct analyses of mergers' effects.[150] Qualitative data, such as documents and testimonials, may be helpful, but it is quantitative data that economists and lawyers have principally relied on to conduct these assessments.[151]

2. The Price Cap Will Not Resolve the Uncertainty Problem

The FCC, in evaluating the proposed merger between Sirius and XM, confronted an uncertainty problem. The uncertainty arose from the insufficiency of information that was needed to establish the product and geographic markets for SDARS.[152] Specifically, there was insufficient pricing information to calculate cross-price elasticities of demand.[153] As a result, the FCC approved the merger under the presumption that the voluntary commitments made it more likely than not that the merger would be in the public interest.[154] It also accepted a price cap on Sirius and XM's current prices without research as to whether these prices were the most

142. *Id*. at 361.
143. *See* Froeb, Hosken & Pappalardo, *supra* note 135, at 358, 361.
144. *Id*. at 359.
145. *Id*. at 361.
146. Kovacic, *supra* note 121, at 843.
147. Froeb, Hosken & Pappalardo, *supra* note 135, at 370.
148. Kovacic, *supra* note 121, at 843.
149. Froeb, Hosken & Pappalardo, *supra* note 135, at 371.
150. *Id*. at 366.
151. *Id*. at 366–67.
152. FCC Decision, *supra* note 8, at 22, 25.
153. Thomas W. Hazlett, *Some Dynamics of High-Tech Merger Analysis in General and with Respect to XM-Sirius*, 4 J. COMPETITION L. & ECON. 753, 757 (2008).
154. FCC Decision, *supra* note 8, at 46.

efficient.[155] Comparable situations have arisen in the past[156] and the results have been poor.[157] Here, the FCC had no choice but to make an ex ante decision regarding the merger,[158] but because an uncertainty problem existed in the SDARS market, it was important for the Commission to at least leave open the possibility that meaningful ex post monitoring of the merger could be conducted.[159] Yet, there are two explanations why the FCC's approval of the Sirius-XM merger did not leave open this possibility.

One explanation for the impossibility of conducting a meaningful ex post assessment of the Sirius-XM merger is that the FCC did not lower the barriers to entry into the SDARS industry. Market entrants (even potential ones) have the ability to impact post-merger prices.[160] Thus, if the possibility existed for new firms to enter the SDARS industry, then Sirius XM Radio Inc. might have felt pressure to lower their prices below the price cap,[161] resulting in demand changes and quantitative data for research.[162] However, an entrant into the SDARS industry would bear the brunt of some very significant costs. For example, there are "significant fixed costs of establishing a nationwide radio network."[163] These costs, in addition to the costs endured to develop technology, market products, and develop a client base, exceeded $5 billion to both Sirius and XM.[164] There are also the costs of acquiring spectrum that a new SDARS provider would need to concern itself with.[165] Not only would a new SDARS company have to purchase spectrum—an acquisition that cost both Sirius and XM more than $83 million[166]—but "because there is physically no other spectrum allocated for SDARS, the acquisition of spectrum by an entrant would

---

155. *Id*. at 47–48.

156. *See, e.g.,* FTC v. Butterworth Health Corp., 946 F.Supp. 1285 (W.D. Mich. 1996).

157. The FTC lost in its request for an injunction to prevent the merger of Butterworth Health Corporation and Blodgett Memorial Medical Center, the two largest acute care hospitals in Grand Rapids, Michigan. *Id.* at 1288, 1303. The court accepted the FTC's evidence that the proposed merger would result in two near-monopolies yet it allowed the merger due to the "Community Commitments" made, which included post-merger price regulations. *Id*. at 1294, 1298, 1302–03. Later, studies would show that "several health plans believed that they were paying more . . . than they most likely would have been absent the merger." David Balto & Maleah Geertsma, *Why Hospital Merger Antitrust Enforcement Remains Necessary: A Retrospective on the Butterworth Merger*, 34 J. HEALTH L. 129, 154 (2001) (since renamed J. HEALTH & LIFE SCI.).

158. *See* 47 C.F.R. § 25.119(a) ("You must file an application for Commission authorization before you can transfer, assign, dispose of (voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation or any other entity) your station license or accompanying rights. The Commission will grant your application only if it finds that doing so will serve the public interest, convenience and necessity.").

159. *See* discussion *supra* Part II.C.

160. *Horizontal Merger Guidelines*, *supra* note 43, § 3.0.

161. *See id*.

162. *See* Froeb, Hosken & Pappalardo, *supra* note 135, at 366–67.

163. Sidak & Singer, *supra* note 83, at 736.

164. Corriero, *supra* note 21, at 426.

165. Sidak & Singer, *supra* note 83, at 736.

166. *FCC Announces Auction Winners*, *supra* note 27, at 18,727.

entail not just buying spectrum, but also convincing the FCC to allocate additional spectrum for an additional SDARS provider."[167] Consequently, because of these significant barriers, entry of a new SDARS provider is highly unlikely.

A second explanation for the impossibility of conducting meaningful ex post research of the merger is the impact of the price cap. In competitive markets, when a seller makes the decision to adjust the price of its product, the level at which that product is consumed will subsequently adjust as well; if the seller decides to raise prices, then consumption will typically fall, while if the seller reduces prices, consumption will typically rise.[168] Sellers might also adjust their prices in response to shifts in consumer demand.[169] Typically, if demand rises, prices will follow.[170] On the other hand, if demand falls, prices will be adjusted downward as well.[171] All of these adjustments in prices and consumption produce quantitative data which can be used to analyze such things as the substitutability of certain goods and the boundaries of markets.[172] Thus, in a post-merger market where prices and consumption can freely adjust to one-another, the possibility of collecting quantitative data to conduct research is great. Imposing a price cap, on the other hand, will impede these adjustments from taking place. As a result, the data which is used to evaluate the boundaries of markets and to measure the substitutability of different products—information which can be used to solve market uncertainty—will not be produced. The FCC's decision to impose a price cap is therefore flawed in that it fails to enlighten the FCC as to the SDARS market's elasticity and to alleviate the uncertainty problem that exists in the SDARS industry.

D. CONCLUSION

The price cap relied on by the FCC is a flawed solution. Not only do past experiences with price caps indicate that it will be ineffective,[173] but it is also against FCC policy[174] and will inhibit the government from learning anything about the SDARS market that could benefit future policy decisions.[175] It is thus readily clear that, when evaluating the merits of

---

167. Sidak & Singer, *supra* note 83, at 736.
168. *See* EDWIN MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 20–24 (3d ed. 1979).
169. *Id.* at 33–34.
170. *Id.*
171. *Id.*
172. *See* A. ASIMAKOPULOS, AN INTRODUCTION TO ECONOMIC THEORY: MICROECONOMICS 23–35 (1978).
173. *See* discussion *supra* Part II.A.
174. *See* discussion *supra* Part II.B.
175. *See* discussion *supra* Part II.C.

proposed mergers that are plagued by uncertainty, regulatory agencies would be ill advised to rest their approval upon any price caps.

III. PROPOSED POLICY FOR MERGERS PLAGUED BY UNCERTAINTY

While the FCC erroneously based its decision to approve the Sirius-XM merger on the voluntary price cap, not everyone shared the Commission's position on the appropriate remedy. Hoards of both proponents and opponents of the merger advocated far simpler solutions—for the proponents, it was outright approval of the merger; for the opponents, it was outright rejection. While each side put forth meritorious arguments, when faced with a market whose contours are uncertain, as is the case with SDARS, neither position leads to an optimal outcome. Rather, the middle ground—approving mergers and subsequently conducting ex post evaluations—is the best solution in the face of uncertainty.

A. THE FLAW OF THE OUTRIGHT APPROVAL AND REJECTION SOLUTIONS

When the Sirius-XM merger proposal was announced, over 17,000 formal and informal comments poured into the FCC advocating their writers' and constituencies' positions.[176] Many of these statements argued for outright approval of the merger because of the public interest benefits to consumers. When horizontal mergers are consummated, oftentimes efficiencies are generated which "can enhance the merged firm's ability and incentive to compete, . . . result[ing] in lower prices, improved quality, enhanced services, or new products."[177] These were some of the benefits that the merger proponents,[178] the FCC,[179] and the DOJ foresaw.[180] In

---

176. FCC Decision, *supra* note 8, at 15.

177. *Horizontal Merger Guidelines*, *supra* note 43, § 4.

178. Comment of American Trucking Associations, Inc., FCC MB Docket No. 07-57, June 21, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519559657 ("Combining their operations will result in savings for the two satellite radio providers and will free up additional capacity on their systems."); Comment of Americans for Tax Reform, FCC MB Docket No. 07-57, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519533911 (lower prices); Comment of Circuit City Stores, Inc., FCC MB Docket No. 07-57, June 28, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519537861 (improved offerings); Comment of General Motors Corporation, FCC MB Docket No. 07-57, Dec. 4, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519816756 (programming packages at lower prices); Comment of National Association for the Advancement of Colored People, FCC MB Docket No. 07-57, June 20, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519558853 (lower prices).

179. FCC Decision, *supra* note 8, at 44–46.

180. DOJ Decision, *supra* note 1, at 4 ("[T]he 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,

addition, efficiencies from horizontal mergers sometimes "result in benefits in the form of new or improved products."[181] Proponents of the merger foresaw these efficiencies as another public interest benefit for consumers,[182] as did the FCC.[183] There were additional proponents of the merger who advocated for outright approval based on the financial difficulties of Sirius and XM,[184] but because the Applicants "did not seek approval on the basis of financial distress," the FCC did not take this into consideration.[185]

On the opposite end of the spectrum are those who advocated for the outright rejection of the merger. When markets become highly concentrated with just a small number of firms, the capacity of those firms to increase prices and decrease output (including innovation) rises.[186] The proponents of outright rejection believed their remedy to be the most beneficial to the public interest because it would preserve market competition, thus inhibiting the ability of the firms to raise prices.[187] It is clear that this was

---

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.").

181. *Horizontal Merger Guidelines*, *supra* note 43, § 4.

182. Comment of American Trucking Associations, Inc., *supra* note 178 ("The proposed merger will . . . expand choices for all consumers, including truckers."); Comment of Americans for Tax Reform, *supra* note 178 ("Sirius and XM have shown in their public filings and congressional testimony that a combined satellite radio company will expand consumer programming choices."); Comment of Circuit City Stores, Inc., *supra* note 178 ("Sirius and XM have indicated that the combined company will offer a wider range of program packages."); Comment of General Motors Corporation, *supra* note 178 ("General Motors believes the proposed merger is and will be in the public interest because the merged company will be able to offer consumers expanded programming choices and a broad range of service packages."); Comment of National Association for the Advancement of Colored People, *supra* note 178 ("Over time, as the companies consolidate duplicate programming, they can better use capacity on their system to offer even more unique and diverse programming to underserved populations.").

183. FCC Decision, *supra* note 8, at 38–39.

184. *See* Comments of Edwin Meese, III & James L. Gattuso, FCC MB Docket No. 07-57, July 9, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519546849.

185. FCC Decision, *supra* note 8, at 97 (Copps, Comm'r, dissenting).

186. *Horizontal Merger Guidelines*, *supra* note 43, § 2.0.

187. FCC Decision, *supra* note 8, at 96–97 (Copps, Comm'r, dissenting); *id*. at 98–103 (Adelstein, Comm'r, dissenting); Comment of Members of Congress to Alberto R. Gonzales, Kevin J. Martin, & Deborah Platt Majoras, FCC MB Docket No. 07-57, June 18, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519533318 (stating the merger would "create a monopoly which would be devastating to consumers."); Comment of North Carolina Association of Broadcasters to Kevin J. Martin, June 25, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519538863 (stating that competition will cease to exist in SDARS if Sirius and XM are permitted to merge); Declaration of J. Gregory Sidak filed by The Consumer Coalition for Competition in Satellite Radio (C3SR), Mar. 28, 2007, 34, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519008261 ("SDARS represent a distinct product market. Hence, the proposed merger of the only two SDARS providers would constitute a merger to monopoly."); Informal Objection of Prometheus Radio Project, U.S. Public Interest Research Group, & Media Access Project, FCC MB Docket

the solution advocated by FCC Commissioners Copps and Adelstein,[188] and it would have been the winning position had just one additional commissioner sided with them.[189]

Despite the potential merits of each of these positions, both solutions are flawed when there is uncertainty about the parameters and dynamics of the relevant markets. Proponents of merger approval assume that the merger will not result in a monopoly and proponents of merger rejection assume that the merger will result in a monopoly, but neither of these outcomes is even more probable than the other when the information before the regulator is insufficient to delineate the relevant markets. The proponents of outright approval emphasized the great public interest benefits that would arise from the efficiencies generated by the Sirius-XM merger; however, if their implicit assumption that the merger will not result in a monopoly or near-monopoly is false, then those efficiency gains are moot.[190] On the other side, the outright rejection proponents emphasized the need to reject the merger in order to preserve competition and prevent monopolization.[191] However, if their assumption that the merger will result in a monopoly or near-monopoly is incorrect, then this remedy will have deprived consumers of the potential benefits of efficiency gains by preventing the merger.

B. PROPOSAL: MERGER APPROVAL CONDITIONED UPON SUBSEQUENT EX POST MONITORING AND EVALUATIONS

1. Rationale

While both the proponents and opponents of the Sirius-XM merger made strong arguments in support of their positions, when the parameters of

---

No. 07-57, July 9, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519541586 (stating that satellite radio is a distinct product and that allowing the merger will "reduce competition in all aspects, including price, service, choice, and innovation."); Petition to Deny of Common Cause, Consumer Federation of America, Consumers Union and Free Press, FCC MB Docket No. 07-57, July 9, 2007, *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519546595 ("Allowing the merger will eliminate that competitive dynamic and unleash market power to abuse customers.").

188. FCC Decision, *supra* note 8, at 96–97 (Copps, Comm'r, dissenting); *see also id*. at 98–103 (Adelstein, Comm'r, dissenting).

189. Republican Commissioner Deborah Taylor Tate represented the undecided swing vote. Peter Kaplan, *Republican FCC Commissioner Key to XM-Sirius Vote*, REUTERS, July 1, 2008, http://www.reuters.com/article/industryNews/idUSN0126213820080702. She expressed reservations about the merger but in the end voted to approve it alongside her fellow Republican Commissioners. FCC Decision, *supra* note 8, at 104–08 (Tate, Comm'r, concurring); Kaplan, *supra* note 189.

190. Despite efficiency gains realized by the merged entity, consumers would not be better off if the merger is "to monopoly" because then the merged entity could utilize its market power and increase prices. *See Horizontal Merger Guidelines*, *supra* note 43, § 4 ("Efficiencies almost never justify a merger to monopoly or near-monopoly.").

191. *See generally id.*

the concerned product and geographic markets are uncertain, such arguments should be considered good guesses at best.[192] It is entirely possible that the proponents of approving the merger outright will be proven correct in predicting that market efficiencies created by the merger will benefit consumers,[193] but it is also probable that the merger will result in a monopoly[194] or that the impact of the merger will be something nobody could have predicted ex ante. The bottom line is, given the level of uncertainty, there is no way of knowing ex ante what the impact of the settled-upon remedy will be. For this reason, in situations where the market parameters cannot be defined, a compromise between the outright approval and outright rejection positions may be the best solution. Such a solution is merger approval conditioned upon subsequent ex post monitoring and evaluations (Approval and Monitoring Remedy).

The policy of conditioning antitrust remedies on ex post evaluations is not a new one. As of late, there has been an increased willingness of regulators to intervene in closed mergers to consider novel remedies or approaches.[195] A prime example of such an action was the reliance on ex post evaluations in the merger of Evanston Northwestern Healthcare Corp. (ENH) and Highland Park Hospital (Highland Park).[196] In 2000, ENH, which owned two hospitals in the north-Chicago suburbs (Evanston Hospital and Glenbrook Hospital), acquired a third hospital in the area (Highland Park).[197] Two years later, on August 28, 2002, the FTC "announced the formation of the Merger Litigation Task Force," "responsible for reinvigorating the Commission's hospital merger program, which include[d] a review of, and potential challenge to, consummated transactions that may have resulted in anticompetitive price increases."[198] Pursuant to this "hospital-merger retrospective-review," the FTC filed a complaint against the ENH-Highland Park merger in February 2004.[199] Using ex post evidence that, during the years since the merger was consummated, ENH had "raised its prices by significantly more than comparable hospitals because of market power gained through the

192. Bhagwat, *supra* note 124, at 1319.

193. *See* discussion *supra* Part III.A.

194. *See* discussion *supra* Part III.A.

195. Dany H. Assaf & Sarah K. McLean, *It's Not Over Until It's Over: When is the Deal Really Done?*, 23 ANTITRUST 59, 59 (2008).

196. *In re* Evanston Nw. Healthcare Corp., 2005 WL 2845790 (FTC Oct. 20, 2005), *aff'd in part, rev'd in part*, 2007 WL 2286195 (FTC Aug. 6, 2007).

197. Ober Kaler, *Observations and Lessons from the FTC's Evanston Northwestern Healthcare Hospital-Merger Decision*, 20 No. 1 HEALTH L. 24, 24 (Oct. 2007).

198. Press Release, FTC, *Federal Trade Commission Announces Formation of Merger Litigation Task Force* (Aug. 28, 2002), http://www.ftc.gov/opa/2002/08/mergerlitigation.shtm.

199. Jeff Miles, *Analyzing the Evanston Northwestern Healthcare Initial Decision*, ANTITRUST HEALTH CARE CHRON., Jan. 2006, *available at* http://www.ober.com/shared_resources/news/published/health/pub_health_010106a.html (last visited Feb. 21, 2009).

merger,"[200] the FTC successfully proved that ENH had violated § 7 of the Clayton Act by making an acquisition that substantially lessened competition.[201]

The use of ex post monitoring has not been limited to merger remedies. For instance, it has been implemented as part of a remedy to an illegal monopolization claim against Microsoft. In 1994, the U.S. government began a series of antitrust battles with Microsoft.[202] The government's prosecution was based on Microsoft's "attempt[s] to forestall the growth of middleware applications," such as the Netscape Browser and the Java Virtual Machine, through various practices.[203] The government claimed Microsoft had violated § 2 of the Sherman Act[204] "through its practices directed at Netscape and Java . . . aiming to protect its operating system monopoly by extinguishing the threat that the middleware applications could undermine or replace the ubiquitous Windows operating system."[205] Ultimately, Microsoft was found liable by the D.C. Circuit;[206] however, instead of continuing the litigation to the remedial stage, the DOJ negotiated a remedial decree with Microsoft[207] which included an elaborate ex post monitoring system to ensure that Microsoft complied, but also to evaluate future developments in the relevant markets.[208]

Despite the use of ex post monitoring in merger cases such as *Evanston*, the Approval and Monitoring Remedy is not without its faults. One flaw is that such a policy could require approving mergers that will lead to the formation of a monopoly or near-monopoly, thus realizing in the short run all the fears of those who advocated for the outright rejection of the Sirius-XM merger.[209] Also, judicial reversals of mergers could give rise to "a state of uncertainty . . . . Such a situation of uncertainty lasting a number of months or even years could have negative effects on the participating undertakings and on the markets generally."[210]

The adverse consequences that the Approval and Monitoring Remedy could have are real, but they are dwarfed by the positive effects. Under the proposed policy, it is possible mergers may be allowed that will lead to

---

200. *Id.*
201. 15 U.S.C. § 18; *In re Evanston*, 2007 WL 2286195, at Section V.A.
202. Amanda Cohen, *Surveying the Microsoft Antitrust Universe*, 19 BERKELEY TECH. L.J. 333, 333 n.1 (2004).
203. Yane Svetiev, *Antitrust Governance: The New Wave of Antitrust*, 38 LOY. U. CHI. L.J. 593, 664–65 (2007).
204. 15 U.S.C. § 2 (2004).
205. Svetiev, *supra* note 203, at 665.
206. United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).
207. Svetiev, *supra* note 203, at 667.
208. United States v. Microsoft Corp., CA No. 98-1232 (CKK) (D.D.C. Nov. 12, 2002); Svetiev, *supra* note 203, at 668.
209. *See supra* text accompanying note 187.
210. Case C-413/06 P. Bertelsmann AG v. Sony BMG Music Entm't, 2007 WL 4334882, at para. 83 (E.C.R. Dec. 13, 2007).

monopolies or near monopolies, but such monopolizations will be short-lived because the regulator can implement corrective measures in such cases. Furthermore, the negative impact of creating uncertainty in the market will be outweighed by the positive impact of improved outcomes for consumers, which this policy is best positioned to accomplish. While ex ante merger decisions in uncertain markets can only use pre-merger evidence to make predictions about the proposed merger's potential impact,[211] the Approval and Monitoring Remedy can use the "evidence of the merger's actual effects on a market."[212] "In particular, the courts [will] be able to scrutinize the merged entity's behavior for any anticompetitive signs in a post-merger environment" and "[t]he agencies [will] also have more opportunity to conduct probative economic studies and seek evidence from affected customers, suppliers, and competitors."[213] Thus, after ex post assessments, regulatory agencies will be far better situated to evaluate mergers.

This approach also includes two additional advantages. First, reevaluations based on ex post studies "may translate into longer and more 'bullet proof' reviews that are more likely to withstand challenges in courts as well as in the public domain."[214] Second, as was previously demonstrated by the studies of the FTC's Bureau of Economics, the policy could help guide and improve future policy decisions by providing regulators with useful information about the impact of their previously implemented policies.[215] For all these reasons, the benefits of the Approval and Monitoring Remedy outweigh its flaws.

2. Implementation

The process of implementing the Approval and Monitoring Remedy requires four steps: (1) determine that there is a sufficient level of ex ante uncertainty; (2) approve the proposed merger; (3) conduct an ex post assessment of the consummated merger; and (4) take action based on the results of the ex post assessments. First, a determination that the product and geographic markets of the merging firms cannot be delineated is one possible finding that would establish an uncertainty problem. If the markets *can* be delineated, then there is no uncertainty problem and the regulatory agency can make its determination as to approving or rejecting the proposed merger as it sees fit.

After establishing that an uncertainty problem exists, the second step in the process is to approve the merger.[216] However, the regulator should have

211. Kovacic, *supra* note 121, at 846.
212. Assaf & McLean, *supra* note 195, at 60–61.
213. *Id.* at 61.
214. *Id.*
215. Froeb, Hosken & Pappalardo, *supra* note 135, at 371; Kovacic, *supra* note 121, at 846–47.
216. The rationale for approving the merger was discussed in Part III.B.1.

the freedom to err on the side of caution if there are strong reasons for doing so. For example, in a merger environment where there is a large consumer base and it is believed that there are no product substitutes, a regulator should have the freedom to reject the merger outright. On the other hand, in a situation such as Sirius-XM where it is likely that terrestrial radio is a viable substitute for satellite radio, the regulator should approve the merger at this stage.

Merger approval is followed by the third step: conducting ex post monitoring and assessment of the consummated merger. The goal of these assessments is to determine the impacts of the merger that could not be anticipated ex ante, including any anticompetitive impact. Quantitative data, such as variations in retail price, must be gathered to determine the precise anticompetitive impact of the merger,[217] but qualitative data concerning the anticompetitive impacts of the merger, such as testimonial evidence from customers, suppliers, executives, and competitors, can be used as well.[218]

How the ex post assessments are to be conducted is for the regulatory agency to determine. The agency can conduct the assessment itself or it can devise a process similar to the one created by the DOJ for the Microsoft settlement in which third parties and expert committees were involved.[219] In that situation, the DOJ monitored Microsoft through multiple channels, including peer evaluators ("a court appointed technical committee of experts"),[220] Microsoft's own internal compliance unit, and a joint status reporting system with reports produced by both the DOJ and Microsoft that "describ[ed] and evaluat[ed] Microsoft's compliance with the remedy decree."[221] The advantages of this method include the ability to tap into the "on-the-ground expertise" of third parties, to "promote[] learning by all who are involved in the process," and to adjust strategies based on the content of the status reports.[222]

The final step of the Approval and Monitoring Remedy consists of evaluating the ex post assessments and taking appropriate action based on the results. The ex post assessments could lead to a finding that the merger had no anticompetitive impact or that it did. If the ex post evaluations show that approving the merger had no anticompetitive impact, then it should be

---

217. Froeb, Hosken & Pappalardo, *supra* note 135, at 366; *see, e.g.,* Miles, *supra* note 199 (The Evanston Hospital merger was deemed anticompetitive after an ex post assessment produced quantitative pricing data which showed that Evanston Hospital had significantly raised its prices after merging with Highland Park Hospital).

218. Assaf & McLean, *supra* note 195, at 61 (regulatory agencies could "seek evidence from affected customers, suppliers, and competitors."); Froeb, Hosken & Pappalardo, *supra* note 135, at 366–67 ("[I]n most merger investigations, economists rely on qualitative data, like marketing documents and testimonial evidence from customers, company executives, and competitors.").

219. Svetiev, *supra* note 203, at 681.

220. *Id.* at 669.

221. *Id.*

222. *Id.* at 680.

left alone. However, if an anticompetitive impact is seen in the assessments, the regulatory agency has the option to impose either a structural remedy or a conduct remedy.[223] Structural remedies "generally will involve the sale of physical assets by the merging firms" while "conduct remed[ies] usually entail[] injunctive provisions that would, in effect, manage or regulate the merged firm's postmerger business conduct."[224] Structural remedies are the preferred remedy of the DOJ in merger cases since, compared to conduct remedies, "they are relatively clean and certain, and generally avoid costly government entanglement in the market."[225] Moreover, structural remedies are the normal remedy for a consummated but anticompetitive merger, as divestitures often may be used "to restore the status quo."[226]

Despite regulatory agencies' preference for structural remedies, there have been instances where conduct remedies have been used instead to curb the anticompetitive effects of a consummated merger. For example, the remedy that the FTC employed after successfully challenging the Evanston Hospital merger was a conduct remedy.[227] Originally, Administrative Law Judge Stephen J. McGuire found in favor of the FTC and held that "divestiture [was] the most effective and appropriate remedy."[228] Accordingly, he ruled that ENH must sell Highland Park.[229] However, the divestiture McGuire mandated was vacated on appeal in favor of a conduct remedy.[230] Rather than force ENH to divest itself from Highland Park, the FTC mandated that ENH and Highland Park negotiate separately with payors and that they also have separate negotiating teams to compete with one another.[231] This switch from a structural remedy to a conduct remedy was made because the FTC felt that divestiture would be too difficult to implement since "the hospitals had been integrated for over seven years and . . . the quality improvements and efficiencies from the merger would be lost."[232] Still, the FTC emphasized that conduct remedies should only be used on a very limited basis and that "[d]ivestiture is the preferred remedy for challenges to unlawful mergers."[233] Hence, if ex post evaluations of the merger show an anticompetitive effect, a structural remedy should be employed to account for such effect unless, in the regulator's judgment, it would be too difficult to implement.

223. *See Policy Guide to Merger Remedies*, *supra* note 100, at Part III.
224. *Id.*
225. *Id.*
226. Kaler, *supra* note 197, at 25.
227. *See In re* Evanston Nw. Healthcare Corp., 2007 WL 2286195, (FTC Aug. 6, 2007), at Sec. VIII.
228. *In re* Evanston Nw. Healthcare Corp., 2005 WL 2845790 (FTC Oct. 20, 2005), *aff'd in part, rev'd in part*, 2007 WL 2286195 (FTC Aug. 6, 2007), at Sec. III.F.2.
229. *Id.*
230. *In re Evanston*, 2007 WL 2286195, at Sec. VIII.
231. *Id*.
232. Kaler, *supra* note 197, at 25.
233. *In re Evanston*, 2007 WL 2286195, at Sec. VIII.

IV. CONCLUSION

The FCC committed a serious error by relying on a voluntary price cap in its approval of the Sirius-XM merger. Not only is the cap deficient on its own terms since it applies only to retail prices and has a 36-month enforcement period, but it has an added negative impact when applied in the satellite radio industry, an industry with uncertain market boundaries—it inhibits the resolution of the uncertainty problem by eliminating the possibility of price changes that could have produced data for analysis.

Ex post assessments of mergers are vital to learn about competition in markets and to improve antitrust policies, and they should be the focal point when evaluating merger proposals in markets plagued by uncertainty. Rather than basing its approval of the Sirius-XM merger on a voluntary price cap, the FCC should have permitted the merger without imposing conditions. Subsequently, the FCC should have conducted ex post assessments of the merger to determine whether it had any anticompetitive effect, and if such effects were found, then the FCC could have imposed structural or conduct remedies to reverse those effects. By following this regulatory path, the FCC would have assured itself of making the proper decision and, at the same time, it would have attenuated the uncertainty problem plaguing the market.

Samuel J. Gordon[*]

---

* B.A., University of Michigan (2007); J.D., Brooklyn Law School (expected 2010). I would like to thank my family for all of their love and support, as well as Andrew Kirkpatrick, Paul M. Schwartz, Seher Khawaja, Andrew Diamond, Cynda D'Hondt and Raymond Ling for their input and invaluable editing throughout this process. In addition, I am very grateful to Professor Yane Svetiev for all of his guidance and advice.