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## **XM/Sirius: And Then There Was One**

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The FCC has approved the merger of the only two satellite-delivered audio services (SDARS), XM Radio and Sirius Radio, after 18 months of high- and low-profile discussions, debates, public displays, private conversations and other high drama. Oh yes, and also after XM and Sirius agreed to pony up about \$20 million to resolve the pesky fact that they both had apparently operated numerous terrestrial facilities without the necessary licenses. And also after they both made “voluntary commitments” relative to a wide range of matters, including programming, hardware, intellectual property and pricing.

While the full text of the Commission’s decision had not been issued as of this writing, the press release describing the action, along with the dissenting statements of Commissioners Copps and Adelstein, provide at least a glimpse of the contortions that everyone involved had to perform to achieve this controversial result.

First, a background note. Back in 1997, when the SDARS service was just being created, the Commission specifically and expressly ruled that no single entity would be permitted to hold monopoly control over all SDARS licenses. So XM would be XM, Sirius would be Sirius, and never the twain would meet. So when the two approached the FCC in January, 2007, with their proposal to merge forces, it looked like a long shot at best. But you never know about this kind of thing in Washington.

Initially, many observers assumed that XM/Sirius would argue that the audio media delivery market had expanded since 1997, with the addition of iPods, Internet radio and the like, and that satellite-delivered radio constitutes such a small percentage of that varied market that a SDARS monopoly would cause no harm. But as it turns out, XM/Sirius didn’t need to make that argument, because the Commission majority reached its decision under the “worst case” assumption that the relevant market is limited to SDARS.

It should not come as a great surprise that, under those “worst case” assumptions, even the majority concluded that the merger would “result in potential harms”. After all, if the

market would be reduced from two competing companies to one monopoly, most market theoreticians would ordinarily conclude that the public could be at risk.

But even the most bitter pill can be sugar-coated, and that's just what happened.

XM/Sirius sweetened their proposal by making "voluntary commitments" to:

Cap prices for three years following consummation, "subject to certain cost pass-throughs" after one year. (The Commission also retained the ability to review the cap six months prior to the end of the three-year period and, possibly, extend or modify it, if necessary.)

Offer consumers "new programming packages", including the ability to select programming à la carte.

Make available to a "Qualified Entity or Entities", pursuant to long-term leases or other agreements, rights to four percent of the full-time audio channels on both Sirius and XM platforms (at present, that would be a total of 12 channels). And while they're at it, XM and Sirius also committed to setting aside an equal number of channels for noncommercial educational programming.

Offer interoperable receivers to be available at retail outlets within nine months of consummation.

Refrain from granting any exclusive right to any manufacturer to make, market or sell SDARS receivers. XM and Sirius also agreed to make their intellectual property available "on commercially reasonable terms" to permit any device manufacturer to develop equipment to receive the XM/Sirius service.

File the applications necessary to provide Sirius service to Puerto Rico via terrestrial repeaters within three months of consummation.

There were other more or less incidental aspects to the deal (for instance, XM/Sirius is barred from entering any deals that would bar any terrestrial radio station from broadcasting "live local sporting events"), but you get the idea.

The one other major factor underlying the Commission's decision appears to have been XM/Sirius's willingness to make a "voluntary contribution" of approximately \$20 million to the U.S. Treasury to resolve compliance issues. You may recall that the issues included rampant use of terrestrial repeaters without proper authorization and marketing

of in-car receiving devices that caused significant interference problems in the NCE-FM band. XM/Sirius have also committed to take “additional remedial measures”.

So the Commission has formally rescinded the notion that a monopoly in SDARS is unacceptable. And while the monopoly that the Commission has now embraced is, admittedly, subject to some limitations, those “limitations” are really not much to write home about. After all, they were “voluntary commitments”, which at least suggests that they are not formal regulatory obligations. Plus, the price caps go away in three years, and it’s not clear how long the remaining “commitments” will have to remain in place. And sure, the Commission reserved the right to re-visit the price caps question – and presumably the others as well – but whether or not that will ever happen is anybody’s guess. Plus, since these terms have not been formally codified as regulatory requirements, it would seem that XM/Sirius would be able to pull the plug on some or all of them largely at its convenience (after waiting a decent interval for the sake of appearances). Perhaps the Commission might try to retaliate, but that would most likely end up in litigation – and depending on how the Commission’s final decision here is ultimately worded, the FCC might not have the strongest case.

And anyway, look how XM/Sirius have already responded to very clear regulatory requirements: they appear largely to have thumbed their corporate noses, flagrantly, at prohibitions about use of terrestrial repeaters and consumer device limitations for years, and they still ended up getting what they asked for. Does the Commission believe that “voluntary commitments” will be more binding?

Interestingly, at least one “public-interest law firm” – Mountain States Legal Foundation (MSLF) – has already raised questions about the constitutionality of the programming set-asides to which XM/Sirius were forced to “voluntarily commit”. According to MSLF, the set-asides violate the equal protection clause of the Fifth Amendment because they are, in effect, racial preferences or quotas. It is unclear whether MSLF will attempt to litigate this question, and if it does, whether it will be able to demonstrate that it has standing to do so. But its argument is not frivolous, and MSLF has a history of litigation activity in precisely that constitutional area. We shall see.