

SIRIUS/XM VS. ECHOSTAR/DIRECTV:

A Fundamentally Different Merger for Rural Consumers

JUNE 2007



THIS MERGER IS NOT LIKE ECHOSTAR/DIRECTV

While the FCC raised objections to the DIRECTV-EchoStar merger in 2002, none of those objections apply in the case of the proposed satellite radio merger in 2007, because the product markets at issue in each case are fundamentally different.

- Although some opponents of the satellite radio merger have suggested otherwise, the Commission's review of the proposed merger of DIRECTV and EchoStar in 2002 provides no guidance to the analysis applicable here. This is because the product markets at issue in the two transactions are fundamentally different.
- Satellite radio is a small part of the highly competitive and ever-expanding market for audio entertainment services.
- In contrast, in 2002, the FCC identified a very narrow product market for DBS, finding that each market consisted only of the two DBS providers and the local cable monopoly.
- That narrow finding on the DBS product market gave rise to a number of concerns, such as the reduction of viewpoint diversity and the creation of a monopoly in areas where there was no cable.
- Such concerns do not apply to satellite radio. Even after a satellite radio merger, many competitors—most of which already have larger market shares than satellite radio—would remain.

THIS MERGER IS NOT LIKE ECHOSTAR/DIRECTV

SUMMARY: The FCC’s 2002 analysis of the proposed merger of DIRECTV and EchoStar does not apply to this transaction, because the product markets at issue in each case are fundamentally different. The FCC adopted a very narrow definition of the DBS market, which in turn gave rise to various concerns that do not exist in the broad and competitive audio entertainment market in which satellite radio competes.

Although some opponents of the satellite radio merger have suggested otherwise, the Commission’s review of the proposed merger of DIRECTV and EchoStar in 2002 provides no guidance to the analysis applicable here. This is because the product markets at issue in the two transactions are fundamentally different.

I. THE COMMISSION’S ANALYSIS OF THE PROPOSED DBS MERGER IN 2002 DOES NOT APPLY TO THIS TRANSACTION.

The Commission must review the proposed transaction in light of this evidence of intense competition in the audio entertainment market, not in light of precedent from another context. The evidence in this proceeding shows that satellite radio is one of many options—and in fact, the least commonly used option—that consumers have for accessing audio entertainment today. Thus, even after a satellite radio merger, many competitors would remain, including one—free over-the-air AM and FM radio—that is dominant by a substantial margin.

The Commission’s review of the proposed merger of the two providers of direct broadcast satellite (“DBS”) service in 2002 involved an entirely different set of facts. While the Commission did not “conclusively define” the relevant product market for DBS in 2002 (deciding that it required “additional evidence”), its statements reflected a very narrow view of the relevant product market.¹ After finding that the appropriate geographic market for DBS was local, equivalent to the local cable operator’s franchise area,² the Commission determined that the relevant product market consisted, at most, of the two DBS providers, the local cable monopoly, and select other services.³ In fact, the Commission suggested that the market might not even include cable, a DBS-only view for which then-Commissioner

¹ *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*, Hearing Designation Order, 17 FCC Rcd 20559 ¶¶ 114-15 (2002) (“Hearing Designation Order” or “HDO”).

² *Id.* ¶ 119.

³ *Id.* ¶¶ 114-15.

Martin criticized the majority.⁴ The Commission further found that this market excluded terrestrial broadcast television altogether.⁵

Having thus concluded that the relevant product market for DBS included at most three providers per local market, the Commission proceeded to identify possible public interest harms it believed might result from the merger. However, none of these concerns arises in connection with the XM-Sirius merger, given the far broader product market in which it competes:

“Merger to Monopoly” Problem. The FCC found that, in rural areas where there was no cable, a DBS merger would result in a monopoly.⁶ An XM-Sirius merger will not produce this same result, given the higher number of competitive alternatives.⁷

Impact on Spectrum Policies. The FCC cited as one of its “foremost concerns” the fact that a merger would result in a single company controlling the entire U.S.-allotted, full-CONUS DBS spectrum.⁸ Specifically, although the FCC conceded that a merger would create efficiencies by eliminating duplicative programming, it found that this result “appear[ed] to be inconsistent with well-established federal pro-competitive spectrum policies” that favored multiple licensees.⁹ But such spectrum policies are based on competitive concerns, and in the case of satellite radio—in contrast to satellite radio—there would be substantial competition (including from competitors using other types of spectrum) even after a satellite radio merger. Moreover, notwithstanding the FCC’s statements in 2002, there is

⁴ *Id.*, Martin Statement at 131 (criticizing the majority’s “unwilling[ness] to conclude that cable and DBS services compete”).

⁵ Although the Commission did not clearly explain its reasoning for excluding broadcast television in that order, it has consistently excluded broadcast television in defining the relevant product markets for DBS and cable. Despite acknowledging that over-the-air, broadcast television competes directly with cable and DBS, the Commission has found that broadcast television does not constrain pricing of other MVPDs. *Compare Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 2005 WL 1939218, MB Docket No. 05-255, at ¶ 6 (rel. Oct. 3, 2005) (noting that “[m]ost consumers can receive video programming from broadcast television stations over the air, one cable provider, at least two DBS providers, and, in limited cases, a wireline overbuilder or other delivery technology”), with *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 75 (2004) (finding that “broadcast television is not sufficiently substitutable with the service provided by MVPDs to constrain attempted MVPD price increases, and hence, is not in the same relevant product market”).

⁶ *HDO* ¶ 99.

⁷ This argument would apply even in those few rural areas in which terrestrial radio is not available, as there would remain other competitive alternatives for mobile entertainment, such as iPods and like devices.

⁸ *HDO* ¶ 87.

⁹ *Id.* ¶¶ 57, 88.

precedent for having a single licensee in a band (i.e., nationwide licenses).¹⁰

Reducing Viewpoint Diversity. Although the FCC dismissed arguments that the DIRECTV-EchoStar transaction would impair programming diversity, it found that the merger would “diminish[] viewpoint diversity by reducing the number of . . . editors available to American consumers.”¹¹ The FCC found that DBS operators contribute to viewpoint diversity by playing a “gatekeeper role” that “clearly affects” which entertainment and news programming is available.¹² The audio entertainment market does not present the same concern, since it includes many different providers/editors. Also, satellite radio at present probably does not contribute to viewpoint diversity to the same degree as DBS providers. In addition, the FCC’s findings concerning DBS turned on whether DBS could provide local news and public affairs programming; once DBS providers developed that capability (by retransmitting local broadcast signals), the FCC found that they promoted viewpoint diversity.¹³ XM and Sirius by FCC mandate do not provide locally-oriented programming.

Increased Market Concentration. The FCC found that the DBS merger would “increase concentration in a market that is already highly concentrated,” creating a risk of higher prices and other anti-competitive effects.¹⁴ This concern does not apply in the context of satellite radio, where the same degree of concentration does not exist. Rather, terrestrial radio has the highest market share, so any merger between the satellite radio providers would only serve as a check on that dominance.

Barriers to Entry. The FCC also found that there were “significant barriers to timely competitive entry” in the MVPD market, eliminating any check on the market power of the merged company.¹⁵ That concern does not carry the same weight in the context of satellite radio, given the kind and number of competitors that have already entered.

•••••

IN SHORT, unlike the DBS merger reviewed by the FCC five years ago, the proposed merger between XM and Sirius comes at a time of strong and growing competition in audio entertainment. In fact, in contrast to the DBS context, even a merged satellite radio provider would possess a slight market share and be constrained by the multiplicity of other media. Accordingly, the Commission’s conclusions concerning the proposed merger of DIRECTV and EchoStar have no relevance to the transaction proposed here.

¹⁰ See, e.g., *Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”)*, Report and Order, 12 FCC Rcd 10785 ¶ 46 (1997); *Amendment to Parts 1, 22, 27 and 90 of the Commission’s Rules to Licensee Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands*, Report and Order, 17 FCC Rcd 9980 ¶¶ 21-22 (2002).

¹¹ *HDO* ¶ 52.

¹² *Id.* ¶ 51.

¹³ *Id.* ¶ 52.

¹⁴ *Id.* ¶ 139.

¹⁵ *Id.* ¶ 142.