STATEMENT OF
COMMISSIONER MICHAEL J. COPPS, DISSENTING

Re: *In the Matter of Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57.*

The majority's own findings provide a compelling case for rejecting this merger:

(1) We must assume that this is a merger to monopoly;[1]
(2) The merged company will possess the incentive and ability to impose monopoly price hikes on consumers;[2]
(3) Consumers will need protection for the foreseeable future because (a) the merged company's incentive and ability to impose monopoly price hikes will only grow over time,[3] and (b) the emergence of another satellite radio competitor is unlikely;[4] and
(4) The pricing restrictions imposed on the merged company will expire in three years.[5]

The inescapable logic of the majority's findings is that by 2011 satellite radio subscribers will face monopoly price hikes by a company with the incentive and ability to impose them.[6] No one has been able to explain to me how this could possibly serve the public interest.[7]

The majority's argument is that it can stack up enough "conditions" on the merged entity—spectrum set-asides, price controls, manufacturing mandates, etc.—to tip the scale in favor of approval. In essence, the majority asserts that satellite radio consumers will be better served by a regulated monopoly than by marketplace competition. I thought that debate was settled—as did a unanimous Commission in 2002 when it declined to approve the proposed merger between DirecTV and Echostar:

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[1] *See* Order at ¶¶ 47-50 (finding that the Commission must presume that satellite radio constitutes a single, national product market, and that "the proposed merger is a merger to monopoly").
[2] *Id.* at ¶¶ 5, 50.
[3] *Id.* at ¶¶ 54, 104.
[4] *Id.* at ¶¶ 5, 49.
[5] *Id*. at ¶ 107. The majority's statement that the FCC will review the price cap before the three-year period expires is little more than a fig leaf. It permits the majority to imply that it is not leaving consumers completely unprotected in 2011, while leaving all of the difficult decisions to a future Commission. That Commission will scarcely appreciate the Hobson's choice we are bestowing on them: let the price caps expire in the face of a monopoly provider or impose a new system of rate regulation on an industry that has never had one in the past.
[6] The price cap adopted by the majority permits certain costs to be passed through to consumers even during the three-year period. To the extent that occurs, even the three-year price controls could prove illusory.
[7] None of the remaining conditions address this fundamental consumer harm and I therefore do not address them at length. I would note, however, that many of them are chock-full of holes and/or limitations that could render them meaningless.

> 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.[8]

That preference for competition is why the Commission has almost never permitted a single commercial licensee to hold all of the spectrum allocated to a particular service, and why (until today) the Commission required that there always be at least two satellite radio licensees. I understand why the companies would prefer to escape the rigors of competition. What I cannot understand is why the majority thinks consumers will be better off without it.

Some may say that the majority isn't really permitting a merger-to-monopoly because satellite radio is part of a larger audio entertainment market that includes iPods, terrestrial radio, and a plethora of new technologies that everyone "knows" are just around the corner. But that is not the majority's position. The majority finds that no one has proved that the relevant product market includes anything other than satellite radio and that competitive entry is unlikely for the foreseeable future. So the majority itself takes the argument away.

Others may say that whether the combined entity is a monopoly is beside the point because one or both of them would not survive anyway—so there's no harm in letting them merge. But the merging companies do not seek approval on the basis of financial distress and the majority makes no findings in that regard. So this claim is not before us. I have said many times that I am willing to consider mergers where financial viability is at stake. But that's not this merger. We must assume that the marketplace can support two financially viable competitors.

I have said from the outset that approving this merger would be a steep climb for me. It proved to be just that. In the end, after cutting through all the heat and noise and lobbying this proceeding has generated, we are left with the unshakable reality of a merger-to-monopoly in a market that could sustain competition. I can find no precedent or public interest justification for that outcome. I dissent.

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[8] *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation; and EchoStar Communications Corporation*, 17 FCC Rcd 20559, 20665 (2002).