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The Honorable Mitch McConnell
United States Senate
361-A Russell Senate Office Building
Washington, DC 20510

Dear Senator McConnell:

The National Association of Broadcasters asked me to assess the effects on competition and consumers of the recently announced "merger of equals" between the two satellite radio providers, XM and Sirius. As a former chairman of the Federal Trade Commission (1981-1985), it is my opinion that a merger between these two entities would be contrary to the public interest.

This is a two-down-to-one merger. There are no other providers in the market. Under traditional antitrust analysis, there are two principal defenses in such a case. The first is the "failing firm doctrine," which holds that when it is inevitable that only one firm can survive the antitrust authorities gain little by blocking the merger. Yet, Mr. Karmazin stressed in his briefings and in sworn testimony before the Antitrust Task Force of the House Judiciary Committee that Sirius is a viable company even without the merger. Mr. Parsons has said the same about XM.

The second principal defense is that entry into the market is so free that should this merged firm perform poorly from consumers' standpoint, new firms would enter. But this is a very complicated business, involving very sophisticated technology and the use of techniques over which many already have (intellectual) property rights. It is also a very capital-intensive industry, involving the launch of working satellites and an on-the -ground distribution network. In fact, the losses the two companies have run can be traced primarily to their having made sizable capital investments that only now are beginning to pay off.

The new defense that has emerged is Mr. Karmazin's assertion that XM and Sirius are part of a much larger market – it isn't just satellite radio, it's broadcast radio, i-Pods, CDs, and so forth – and the merger is not two-down-to-one, but a merger of small players in a large market. This is an empirical question, of course. No doubt there is *some* substitutability among these products. But to meet the test of not harming consumers, there has to be such substitutability that the merged firm could not raise its prices and earn monopoly returns for a sustained period. It is common sense that to many consumers the alternatives are not an adequate substitute, and as described above, entry into this market would be very, very difficult.

Whatever way you look at it, the merged firm would have an ability to raise prices to consumers and/or cut costs and quality by limiting the number and variety of offerings and slowing, if not reversing, the rate of technological advance.

Accordingly, I conclude that the merger of XM and Sirius would be contrary to the public interest.

Sincerely yours,

James C. Miller III