7-1-2011

Indecency, a la Carte, and the FCC's Approval of the Sirius XM Satellite Radio Merger: How the FCC Indirectly Regulated Indecent Content on Satellite Radio at the Expense of the "Public Interest"

Elizabeth A. Pike

INDECENCY, A LA CARTE, AND THE FCC'S APPROVAL OF THE SIRIUS XM SATELLITE RADIO MERGER: HOW THE FCC INDIRECTLY REGULATED INDECENT CONTENT ON SATELLITE RADIO AT THE EXPENSE OF THE "PUBLIC INTEREST"

ELIZABETH A. PIKE*

---

* J.D. magna cum laude, University of Miami School of Law, 2010; B.A. magna cum laude, Political Science, Dickinson College, 2006. I would like to thank Professor Lili Levi of the University of Miami School of Law for her enthusiastic guidance and assistance in writing this article. Additionally, my deepest gratitude is owed to my parents, Christopher and Irene Pike, who provided me with the opportunity to further my education, and who have always encouraged and supported me in all my endeavors. Lastly, I would like to thank the UNIVERSITY OF MIAMI BUSINESS LAW REVIEW for their editorial role. All errors are my own.

I. INTRODUCTION

When Howard Stern made his highly anticipated move from terrestrial broadcast radio to Sirius Satellite Radio, he emphasized the differences between the two mediums, particularly as they related to the regulation of indecent content.[1] Historically, terrestrial radio has enjoyed limited First Amendment protection and has been held to specific rules regarding what can be heard on the public airwaves and also when it can be heard.[2] In the Supreme Court's landmark decision in *FCC v. Pacifica*,[3] the Court relied on specific justifications based on the broadcast medium to uphold the validity of its public airwaves regulations.[4] In contrast, the Federal Communications Commission ("FCC" or "Commission") has explicitly stated that it does not have the authority to regulate indecent content on satellite radio in the same way it can justify regulation of the same content on terrestrial radio,[5] despite some obvious similarities between terrestrial and satellite radio.[6]

Given the recent crackdown on indecent content on terrestrial radio, the nation's only two satellite radio companies had become a safe haven of sorts for content that would face heightened scrutiny if it were broadcast on terrestrial radio. However, the future of this safe haven was placed in jeopardy when, bridled with extensive debt and the failure to ever turn a profit,[7] Sirius and XM came to the FCC in 2007, hat in hand, to obtain

---

1 *See* Aurele Danoff, *"Raised Eyebrows" Over Satellite Radio: Has* Pacifica *Met Its Match?*, 34 PEPP. L. REV. 743, 773-79 (2007).

2 *See generally* FCC v. Pacifica Found., 438 U.S. 726 (1978) (noting that of all forms of communication, broadcasting receives the most limited First Amendment protection because of both its pervasiveness and accessibility to children).

3 *Id.*

4 In *Pacifica*, the Court's four main concerns that supported having different regulations for broadcast media were scarcity of the spectrum, pervasiveness, children, and free access as opposed to subscription-based services. *See id.* at 731 n.2.

5 *See, e.g.*, *In re* Litigation Recovery Trust, 17 F.C.C.R. 21852, 21856 (2002); *In re* Applications of Harriscope of Chicago, Inc., 3 F.C.C.R. 757, 760 n.2 (1988) (citing Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985)). *See also infra* Part III.B and accompanying footnotes.

6 For example, satellite radio, like terrestrial radio, utilizes the electromagnetic spectrum. *See* Danoff, *supra* note 1, at 774. The FCC is charged with allocating spectrum use for the "public interest, convenience, and necessity." 47 U.S.C. § 307 (2004). Thus, scarcity considerations play an important role in the FCC's public interest evaluation, and because of this, the FCC may have a valid argument for regulating satellite digital audio radio services ("SDARS") more heavily. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391 (1969) (noting that "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use"); *see also* Danoff, *supra* note 1, at 774.

7 *See In re* Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio

license-transfer approval for their proposed merger.[8] The Commission, engaged in its own crusade against indecent content on both radio and television,[9] once again found itself in the extremely powerful position of deciding the fate of satellite radio[10] and, likewise, the fate of unregulated indecent content on radio.

When Sirius and XM came before the Commission seeking approval of their merger, the FCC knew that the companies would agree to almost anything to facilitate the license-transfer approval.[11] After a long and arduous back-and-forth merger review process, the FCC finally determined that the merger of the two satellite radio stations was in the "public interest, convenience, and necessity," but only contingent upon specific "voluntary" conditions.[12] One of these "voluntary" conditions

---

Holdings, Inc., Transferor To Sirius Satellite Radio, Inc., Transferee, 23 F.C.C.R. 12348, 12389 (Aug. 5, 2008) (mem. op. & order & report & order) [hereinafter Order].

8 *See generally id.*

9 *See generally In re* Complaints Against Various Television Licensee Concerning Their December 31, 2004 Broadcast of the Program "Without a Trace," 21 F.C.C.R. 2732 (2006) (fining CBS for an episode involving a depiction of a teenage orgy); *In re* Clear Channel Broad. Licenses, Inc., 19 F.C.C.R. 6773 (2004) (noting that Clear Channel Radio was fined for airing segments of Howard Stern's radio program which referenced anal sex); *In re* Clear Channel Broad. Licenses, Inc., 19 F.C.C.R. 1768 (2004) (noting that the FCC proposed a fine of $755,000 against Clear Channel Communications for widespread indecency in the "Bubba the Love Sponge" program); *In re* Infinity Broadcasting Operations, Inc., 18 F.C.C.R. 19954 (2003) (fining Infinity Broadcasting Corp. $357,500 for an Opie & Anthony broadcast).

10 Both Sirius and XM argued that the merger was necessary for satellite radio to survive, as neither company had managed ever to turn over a profit. *See* Order, *supra* note 7, at 12389. Sirius's and XM's marketplace competition "has exacerbated their difficult financial circumstances, as they have competed for compelling programming and driven up the costs for each other dramatically." *Id.* at 12445 (dissenting statement of Comm'r. Jonathan S. Adelstein).

11 *See* Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 39 (1984) ("Often an agency with the power to deny an application . . . or to delay the grant of the application will grant approval only if the regulated firm agrees to conditions. The agency may use this power to obtain adherence to rules that it could not require by invoking statutory authority.").

12 *See* Order, *supra* note 7, at 12349, 12352. The author uses quotation marks around "voluntary" because of the enormous power that the Commission holds over merger applicants. When applicants come to the FCC seeking merger approval, the Commission's approval is usually the last step in a long process. *See, e.g.*, Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49, 52 (2000). In many merger license transfers the FCC and applicants usually

> engage in a high-stakes regulatory dance in which applicants 'volunteer' to take certain actions or to refrain from certain actions as the quid pro quo for favorable agency consideration. The resulting 'voluntary' conditions emerge from an elaborate and often secret process of demands and 'negotiations.' . . . Indeed, there appears to be very little 'voluntariness' about this process.

Id. at 52-53. *See infra* Part II.B and accompanying text.

agreed to by Sirius, XM, and the Commission was the obligation to offer a variety of new, smaller programming packages and a la carte channel options.[13] It was no coincidence that proponents of a la carte programming have emphasized not only its supposed economic benefits to consumers, but also, and more importantly, its asserted benefits related to regulating program content.[14] Taking advantage of the "embattled" companies' "beleaguered" state,[15] the FCC was able to circumvent what it perceives to be limitations on its authority to regulate indecent content on satellite radio by indirectly achieving such regulation through voluntary conditions attached to its structural merger review authority.

This article examines the FCC's authority to regulate indecent content on satellite radio; the propriety of its decision to utilize merger conditions, specifically the theme-tiered programming and a la carte pricing condition, to accomplish a policy goal indirectly that the Commission has explicitly stated it does not have the authority to achieve directly; and the effects on the public interest of circumventing what the FCC perceives as limitations on its authority to regulate indecent content. Part II provides a brief history of the development of satellite radio and its relation to terrestrial radio, along with the process that ended in the FCC's approval of the merger between Sirius and XM, contingent on specific conditions. Part III examines the FCC's regulation of indecent content on both terrestrial radio and satellite radio, and the regulatory differences between the two mediums. Part IV discusses the a la carte debate, including how the scheme would operate and the proposed advantages and disadvantages of an a la carte programming option. Part V describes how a la carte and family-friendly programming requirements can be used to achieve the policy goal of regulating indecent content, and how this indirect regulatory route was used by the Commission to regulate content on satellite radio through the back door. The article

---

[13] *See* Order, *supra* note 7, at 12384-89, 12396-97; *see also* News Release, Sirius XM Satellite Radio, Sirius XM Gives Listeners the Choice to Customize Programming (Oct. 2, 2008), http://investor.sirius.com/releasedetail.cfm?releaseid=338100 [hereinafter News Release, Sirius XM Satellite Radio].

[14] *See, e.g.*, Lili Levi, *First Report: The FCC's Regulation of Indecency*, FIRST AMENDMENT CENTER, Aug. 6, 2007, at 49, http://www.firstamendmentcenter.org/about.aspx?id=19102 [hereinafter Levi, *The FCC's Regulation*] (noting that "[t]here has been a grass-roots movement . . . to push cable to an 'a la carte' subscription system for those people who do not want access to indecency on cable.").

[15] *See* Michael J. de la Merced, *Sirius XM Wins a Critical Loan From Liberty*, N.Y. TIMES, Feb. 18, 2009, at B5; Sirius XM Reaches Investment Deal With Liberty, http://dealbook.blogs.nytimes.com/2009/02/17/ sirius-xm-reaches-loan-deal-with-liberty/?scp=1&sq=%22Sirius%20XM%22%20%22embattled%22&st=cse (Feb. 17, 2009, 8:30 EST).

concludes by arguing that the theme-tiered programming and a la carte pricing merger condition, as well as the FCC's indirect regulation through a "voluntary" merger condition, was not in the public interest because of the highly uncertain potential benefits from a la carte, the FCC's lack of transparency during the merger review process, and the First Amendment implications of utilizing a merger condition to regulate speech.

II. BRIEF HISTORY OF SATELLITE RADIO AND THE FCC MERGER APPROVAL CONTINGENT ON SPECIFIC CONDITIONS

A. *The Birth of Satellite Radio*

The turbulent lives of the country's first commercial satellite radio companies began in 1990 when Satellite CD Radio, Inc. filed both a petition with the FCC to allocate spectrum for satellite digital audio radio services ("SDARS" or "DARS")[16] and an application to provide the service.[17] Acting under its power to allocate the electromagnetic spectrum,[18] the FCC allocated the 2310-2360 MHz band[19] (the "S" band) for SDARS in January 1995.[20] The FCC found that allocating the spectrum for satellite radio offered a number of prospective benefits to the

---

[16] Satellite Digital Audio Radio Services, or SDARS, and Digital Audio Radio Service by satellite, or DARS, both refer to satellite radio. This article will use the term SDARS or satellite radio, but other sources reference them interchangeably.

[17] *See In re* Establishment of Rules and Policies for the Digital Audio Radio Satellite Serv. in the 2310-2360 Band, ¶ 5 (FCC) (No. 90-357) (Mar. 3, 1997), *available at* http://www.fcc.gov/Bureaus/International/Orders/1997/fcc97070.txt [hereinafter Establishment of Rules and Policies] (noting that "Satellite CD Radio, Inc. (CD Radio) initiated this proceeding in 1990 by filing a petition to allocate spectrum for satellite DARS and an application to provide the service.").

[18] The Communications Act of 1934 established the Federal Communications Commission, which replaced the earlier Federal Radio Commission that was established under the Radio Act of 1927, in order to regulate "interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151 (1996). Additionally, Congress gave the FCC the power to establish general guidelines of operations and to grant licenses for use of the spectrum. *See id.* § 154(i). As stated in *Red Lion Broadcasting Co. v. FCC*, the FCC's power is to be exercised in the "public convenience, interest, or necessity." 395 U.S. 367, 379 (1969); *see also* 47 U.S.C.A. § 303 (LexisNexis 2010).

[19] In November 1992, the FCC established a proceeding to allocate SDARS license applications to be considered alongside CD Radio's application. *See* Establishment of Rules and Policies, *supra* note 17, ¶ 5. Six license applicants filed before the cut-off, but only four remained at the time of allocation. *Id.*

[20] *Id.* The Commission's rules define SDARS as "[a] radiocommunication service in which audio programming is digitally transmitted by one or more space stations directly to fixed, mobile, and/or portable stations, and which may involve complementary repeating terrestrial transmitters, telemetry, tracking and control facilities." 47 C.F.R. § 25.201 (2010).

public.[21] Some of the future benefits included: providing a continuous high-quality radio service without interruption and fading when traveling across the continental United States; serving portions of the country that were underserved or not served at all by terrestrial radio; and increasing the variety and diversity of programming.[22]

Two years later, using a competitive bidding process, four companies[23] competed for SDARS licenses.[24] In the end, the FCC granted only two licenses:[25] one to Sirius Satellite Radio, Inc. and one to XM Radio, Inc.[26] Significantly, when the FCC granted the two licenses, it expressly directed that the two satellite radio stations *never* merge because the public interest would be served best by two competitive nationwide systems.[27] XM began its service in September 2001 and Sirius initiated its service in February 2002.[28]

---

[21] *See* Establishment of Rules and Policies, *supra* note 17, ¶ 2. Not everyone felt the same way, however. Terrestrial broadcasters expressed a "high level of concern" about SDARS. *Id.* ¶ 8. Moreover, the FCC received letters opposing SDARS from "more than one hundred terrestrial radio station[ ] owners or operators." *Id.*

[22] *Id.* ¶¶ 1, 10-17 ("Motorists on the highways of America may soon be able to tune in to one of many satellite DARS channels offering a particular format without interruption or fading as they travel across the United States. This new service also has the potential to increase the variety of programming available to the listening public. Providers may, for example, offer niche channels that would serve listeners with special interests. Satellite DARS has the technological potential to serve listeners in areas of the country that have been underserved. While, to some extent, DARS will compete with local radio, we anticipate that it will also complement terrestrial radio.").

[23] Of the six license applicants that filed before the December 15, 1992 cut-off date for SDARS applications to be considered, four remained at the time of bidding: Satellite CD Radio, Inc., Primosphere Limited Partnership, Digital Satellite Broadcasting Corporation, and American Mobile Radio Corporation. *Id.* ¶ 5.

[24] *See id.* ¶¶ 6, 73, 143-76 (noting that "[the FCC] will award the two licenses for satellite DARS by using competitive bidding"); *see also* 47 U.S.C. § 309(j) (2009) (authorizing the FCC to auction off spectrum licenses used to review direct payments from subscribers for receiving or transmitting information).

[25] Establishment of Rules and Policies, *supra* note 17, ¶ 73 ("There is sufficient spectrum in the S-band to license only two satellite DARS systems. Dividing the available 25 MHz of spectrum into four equal segments among the four applicants would result in exclusive frequency assignments of only 6.25 MHz for each satellite DARS applicant. Because we have found that a viable and competitive satellite DARS service will require 12.5 MHz, we can license only two systems.").

[26] *See id.* ¶¶ 73, 78; 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, 721 (2008). Sirius Satellite Radio, Inc. was formerly known as CD Radio and XM Radio, Inc. was formerly known as American Mobile Radio. *See* Danoff, *supra* note 1, at 750-51.

[27] *See* Order, *supra* note 7, at 12420; Establishment of Rules and Policies, *supra* note 17, ¶ 78 ("We agree with commenters, that there should be more than one satellite DARS license awarded. Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity

To encourage consumer interest and make the new service more widely available, both companies allied with electronics manufacturers to build satellite radio receivers for a multitude of locations including cars, homes, trucks, and boats.[29] Moreover, certain unique attributes initially helped to generate excitement about satellite radio's benefits. For example, in contrast to terrestrial radio, which only offered a limited number of channels and weaker signal quality, satellite radio offered a unique service with "up to 160 digitally transmitted channels with clear signal quality."[30] The satellite radio stations also initially offered commercial-free programming on all of their music channels and listeners heard fewer commercials on the talk, sports, news, and entertainment channels than were heard on the average terrestrial radio station.[31] Another important advantage of satellite radio, as seen both by the FCC and consumers, was the availability of niche music and entertainment stations.[32] Given this distinctive and dynamic service, "the number of

---

of programming voices.").

[28] *See* Order, *supra* note 7, at 12350.

[29] *Id.* at 12350-51; *see also* Danoff, *supra* note 1, at 751-52; Jessica E. Elliott, *Handcuffing the Morality Police: Can the FCC Constitutionally Regulate Indecency on Satellite Radio?*, 5 CONN. PUB. INT. L.J. 263, 276-77 (2006).

[30] *See* Danoff, *supra* note 1, at 752 (noting that, in contrast to satellite radio, "traditional radio . . . offer[s] a limited number of channels and weak signal quality"); *see also* Gregory B. Phillips, *Indecent Content on Satellite Radio: Should the FCC Step In?*, 26 LOY. L.A. ENT. L. REV. 237, 254 (2006) ("Because the repeaters are located throughout the United States, a satellite subscriber can listen to the same channel no matter where the subscriber travels within the United States.").

[31] *See* Order, *supra* note 7, at 12350-51, 12385; Danoff, *supra* note 1, at 752; Sidak & Singer, *supra* note 26, at 722.

[32] 47 U.S.C.A. §§ 521(4), 532(a) (West 2010) (citing diversity of information sources and services to the public as a goal of FCC regulation). *See also* Danoff, *supra* note 1, at 752; Phillips, *supra* note 30, at 254-55 ("Satellite radio providers 'may . . . offer niche channels that would serve listeners with special interests' that normally would not generate enough advertisement revenue to warrant broadcasting on terrestrial radio. These niche programs could 'fulfill a need for more educational programming, rural programming, ethnic programming, religious programming, and specialized musical programming.'"). The CEO of Sirius, Mel Karmazin, emphasized the importance of the niche programming:

> It is all about content and we have the best content on radio. If you take all the Clear Channel [terrestrial radio] stations and all the Infinity [terrestrial radio] stations, you cannot have the same diversity as we offer. We have 120 channels in all markets. And we can offer all kinds of programs.

Danoff, *supra* note 1, at 752 n.46. Highlighting just how important these niche channels were to consumers, since the merger, "[m]essage boards, blogs, even the FCC's electronic comment filing system are heating up with angry subscribers who have seen the . . . subtraction of their favorite channels." Leigh M. Murray, Comment, *Sirius Mistake: The FCC's Failure To Stop a Merger to Monopoly in Satellite Radio*, 59 AM. U. L. REV. 83, 124 (2009).

subscribers . . . continued to grow" since satellite radio's introduction, albeit not as quickly as some had hoped.[33]

B. *The FCC's Approval of the Merger Subject to Specific "Voluntary" Conditions*

In February 2007, faced with lagging profits and increased competition from other audio technologies, Sirius and XM proposed a multi-million dollar merger between the two companies.[34] Two authorities have statutory obligations to review telecommunications mergers: the United States Department of Justice ("DOJ")[35] and the FCC.[36] After more than a year of intense consideration, the DOJ announced on March 24, 2008, "that it had 'close[d] its investigation of the transaction' without taking any enforcement action against the proposed merger."[37] With the DOJ's blessing, only the FCC's approval of the transaction stood in the way of the proposed satellite radio merger.[38] Pursuant to its power under 47 U.S.C. § 310(d) of the Communications Act, the Commission is not obligated to strike down a proposed merger in its entirety simply because the merger potentially would cause specific

---

[33] *See* Danoff, *supra* note 1, at 752-53.

[34] *See* Order, *supra* note 7, at 12389 (noting that "both Sirius and XM have experienced billions of dollars in losses and that neither company has ever turned a profit"); Danoff, *supra* note 1, at 751 n.41; Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc., XM Satellite Radio Holdings Inc., Transferor, and Sirius Satellite Radio Inc., Transferee (Mar. 20, 2007) [hereinafter Application].

[35] *See* 15 U.S.C. § 18 (1996) (describing the DOJ's authority to regulate monopolies and combinations in restraint of trade).

[36] *Cf.* 15 U.S.C. § 21(a) (1995); 47 U.S.C. §§ 214(a), 310(d) (1997). Additionally, of particular relevance, the FCC has the authority to condition mergers by way of consent decrees under the Clayton Act or under sections 214(c) and 303(r) of the Communications Act. *Cf.* 47 U.S.C. §§ 214(c), 303(r) (1997). *See also* Sarah Elizabeth Leeper, *The Game of Radiopoly: An Antitrust Perspective of Consolidation in the Radio Industry*, 52 FED. COMM. L.J. 473, 478 (2000) ("The FCC and federal antitrust enforcement agencies wear complementary hats. The DOJ and the FTC analyze media transactions under section 7 of the Clayton Act to ensure that a merger is procompetitive and challenges those which 'may substantially lessen competition.' The FCC ensures that a transaction meets the public interest standard by promoting competition and diversity.") (footnotes omitted).

[37] *See* Order, *supra* note 7, at 12363. The DOJ reviews communications mergers and transactions pursuant to its authority under section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition in any line of commerce. *See* 15 U.S.C. § 18 (1996).

[38] *See* Order, *supra* note 7, at 12363. Because receiving FCC approval was the last hurdle that Sirius and XM had to clear, the FCC was in a very powerful position. *See* Tramont, *supra* note 12, at 52-53, 55-58 (noting that the FCC uses licensees' "vulnerability" to pursue goals outside the traditional policy-making process).

public interest harms.[39] Instead, the FCC employs a balancing test under which the benefits of the proposed merger are weighed against any potential harms.[40] Accordingly, when appropriate, the FCC may impose and enforce certain merger-specific conditions on the proposed entity to ensure that the merger serves the public interest.[41] If the benefits, which include the merger-specific conditions, outweigh the harms of the proposed transaction, the merger likely will be found to serve the public interest.[42] As a consequence, in order to encourage FCC approval more quickly, as well as to garner the support of interest groups and lobbyists,[43] on June 13, 2008, XM and Sirius provided letters to the Commission preemptively agreeing to certain "voluntary"[44] conditions that the

---

[39] *See* News Corp. and DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, 23 F.C.C.R. 3265, 3277-79 (2008) [hereinafter News Corp.] (noting that "the Commission's public interest authority enables [it], where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction" and that "[the FCC's] public interest authority enables [it] to rely upon [its] extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits"); 47 U.S.C. § 310(d) (1996) ("No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.").

[40] *Id.* at 3277 (noting that "[the FCC] then employ[s] a balancing process, weighing any potential public interest harms of the proposed transactions against any potential public interest benefits.").

[41] Pursuant to section 303(r) of the Communications Act, the FCC has the authority to impose these merger-specific conditions which may be necessary to ensure that the merger is in the public interest. *See* 47 U.S.C. § 303(r) (1997); Joel D. Corriero, *Satellite Radio Monopoly*, 33 DEL. J. CORP. L. 423, 428 (2008); Tramont, *supra* note 12, at 57 n.24 (noting that conditioning license grants is a "time-honored . . . practice" at the FCC).

[42] *See* News Corp., *supra* note 39, at 3277.

[43] *See* Sidak & Singer, *supra* note 26, at 749-50 (noting that "these goodwill gestures[, including a la carte pricing,] were merely preemptive concessions designed to please key political constituents.").

[44] The author includes quotation marks around "voluntary" because of the enormous power that the Commission holds over merger applicants. When applicants come to the FCC seeking merger approval, the Commission's approval is usually the last step in the long process. *See, e.g.*, Tramont, *supra* note 12, at 52. In many merger license transfers the FCC and applicants often

> engage in a high-stakes regulatory dance in which applicants 'volunteer' to take certain actions or to refrain from certain actions as the quid pro quo for favorable agency consideration. The resulting 'voluntary' conditions emerge from an elaborate and often secret process of demands and 'negotiations.' . . . Indeed, there appears to be very little 'voluntariness' about this process.

Id. at 52-53.

companies were willing to implement to demonstrate that the approval of their transaction would be in the public interest.[45]

Undoubtedly, one of the most significant preemptive conditions which Sirius and XM agreed to in order to secure the merger approval[46] was their offer to freeze the monthly subscription price at the pre-merger monthly rate and to offer a variety of new tiered programming packages that the companies described as "a la carte."[47] The satellite radio providers avowed that they would offer two a la carte options and develop a la carte capable radios, a "Best of Both" programming package, a "mostly music" package, a "mostly news, sports and talk" package, and a discounted "family-friendly" package.[48] The FCC found that this condition, as well as the other "voluntary" commitments,[49] were in the public interest

---

[45] *See* Order, *supra* note 7, at 12359; *see also* Dan G. Barry, *The Effect of Video Franchising Reform on Net Neutrality: Does the Beginning of IP Convergence Mean that it is Time for Net Neutrality Regulation*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 421, 444 (2008) (noting that a regulation "[t]ool used by the FCC has been the creation of conditions in reviewing the mergers of telecommunication companies"); Lisa Blumensaadt, Comment, *Horizontal and Conglomerate Merger Conditions: An Interim Regulatory Approach for a Converged Environment*, 8 COMMLAW CONSPECTUS 291, 307 (2000) (stating that "merger conditions are essentially a contract between the merging parties and the FCC.").

[46] In order to encourage approval of the license transfer, Sirius and XM agreed to a number of voluntary commitments and other conditions including a price cap, new programming packages and a la carte options, interoperable radio receivers, open access, third-party access to SDARS capacity, reservation of channels for noncommercial educational use, and service to Alaska, Hawaii, and Puerto Rico. *See* Order, *supra* note 7, at 12394-415 app. B. Additionally, the commitments and conditions are to be fulfilled according to the specified timeline included in the FCC's license transfer approval order. *Id.* at 12340-41 app. C.

[47] *See* Sidak & Singer, *supra* note 26, at 703. A la carte pricing "involves purchases of very small increments," i.e., selling channels individually on cable television or satellite radio. *See* Thomas W. Hazlett, *Shedding Tiers For A La Carte? An Economic Analysis of Cable TV Pricing*, 5 J. TELECOMM. & HIGH TECH. L. 253, 267 (2006); *see also infra* Part IV and accompanying footnotes.

[48] *See* Order, *supra* note 7, at 12358-59; *see also* News Release, Sirius XM Satellite Radio, *supra* note 13; Press Release, Sirius Satellite Radio, XM and SIRIUS to Offer A La Carte Programming (July 23, 2007), *available at* http://investor.sirius.com/ReleaseDetail.cfm?ReleaseID=255847 ("One option will allow subscribers to choose 50 channels for just $6.99 — a 46 percent decrease from the current standard subscription rate of $12.95. Under this option, customers will also be able to include additional channels for as little as 25 cents each. The second a la carte option will allow subscribers to choose 100 channels and will allow SIRIUS customers to select from some of the best of XM's programming (and XM subscribers to choose from some of the best of SIRIUS' programming). The combined SIRIUS-XM will also offer several other new programming packages, including two 'family-friendly' options, as well. Those choosing one of the 'family-friendly' options will be able to block adult-themed programming and, for the first time, receive a price credit. These packages will set a new standard in audio entertainment and subscription media, offering lower prices, package options, and 'best of both' offerings.").

[49] *See supra* note 46 and accompanying text.

because the benefits of the union outweighed the anticompetitive effects, and thus approved the proposed merger.[50]

III. INDECENT CONTENT ON SATELLITE RADIO

A. *Indecency Regulation by the FCC on Terrestrial Radio*

Under 18 U.S.C. § 1464 of the U.S. criminal code, the FCC has the statutory authority to regulate "obscene, indecent, or profane language" transmitted "by means of radio communication."[51] The FCC has defined indecent material as anything which, in context, "depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium."[52] Current regulations ban indecent content between 6 a.m. and 10 p.m. on terrestrial broadcasts.[53] In order to enforce the ban, the FCC has the authority to assess forfeiture penalties and initiate license revocation proceedings or deny license renewal for violations.[54]

Thus, in indecency cases, the FCC must determine whether the material describes or depicts sexual or excretory organs or activities and, if so, whether the material is "patently offensive" when heard in context.[55] There are three primary factors that the Commission examines when analyzing broadcast material: "(1) whether the description or depiction is

---

50 *See* Order, *supra* note 7, at 12349-50.

51 18 U.S.C. § 1464 (1994) (providing that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."). *See also* Sidak & Singer, *supra* note 26, at 714.

52 FCC, Obscenity, Indecency & Profanity – Frequently Asked Questions, http://www.fcc.gov/eb/oip/FAQ.html#TheLaw (last visited Nov. 8, 2008); *see also In re* Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, Policy Statement, 16 F.C.C.R. 7999, 8000 ¶ 4 (2001) [hereinafter 2001 Policy Statement].

53 *See* 47 C.F.R. § 73.3999 (2010); *see also* Sidak & Singer, *supra* note 26, at 714; FCC, Obscenity, Indecency & Profanity – Frequently Asked Questions, http://www.fcc.gov/eb/oip/FAQ.html#TheLaw (last visited Nov. 8, 2008).

54 *See* 47 U.S.C. § 503(b)(2)(C) (2008); *see also* Sidak & Singer, *supra* note 26, at 714; *see also* FCC, Obscenity, Indecency & Profanity, http://www.fcc.gov/eb/oip/Welcome.html (last visited Nov. 8, 2008). Forfeiture power was greatly increased in 2005 following the passage of the Broadcast Indecency Enforcement Act of 2005. *See* The Broadcast Indecency Enforcement Act of 2005, 47 C.F.R. § 1.80(b)(1) (2010); *see generally* Michael Strocko, *Just a Concern For Good Manners: The Second Circuit Strikes Down the FCC's Broadcast Indecency Regime*, 17 U. MIAMI BUS. L. REV. 155, 202-05 (2008) (discussing the recent significant increase in federal indecency fines).

55 FCC, Obscenity, Indecency & Profanity – Frequently Asked Questions, http://www.fcc.gov/eb/oip/FAQ.html#TheLaw (last visited Nov. 8, 2008).

explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock."[56] No single factor is dispositive of an indecency case.[57]

The foundation of modern indecency regulation was laid in 1978 in *FCC v. Pacifica*.[58] *Pacifica* involved a radio broadcast of comedian George Carlin's monologue entitled "Filthy Words," which aired in the middle of the day.[59] A member of the group Morality in Media complained that his "young son" had heard the "indecent" monologue.[60] Facing a First Amendment challenge, the Supreme Court in *Pacifica* "narrowly upheld" the FCC's authority to regulate indecency.[61] The Court held that due to the "uniquely pervasive" nature of broadcast media in the home, as well as its unique accessibility to children, the Commission had sufficient justification to regulate broadcast content and impose sanctions.[62]

Following the Court's decision in *Pacifica*, the Commission exercised extreme restraint in utilizing its newly approved power to regulate indecent content broadcasted on the public airwaves. Over the next decade, the FCC restricted its indecency enforcement to occasions in which broadcasters used the "seven dirty words" referenced in Carlin's monologue before 10 p.m.[63] However, in 1987, the FCC moved away from its reserved approach regarding indecency regulation to a new approach, under which the agency would begin enforcing a general definition of indecency against language or material that depicts or describes in patently offensive terms measured by existing standards for

---

56 *Id.*

57 *Id.*

58 FCC v. Pacifica Found., 438 U.S. 726 (1978); *see also* Ron Whitworth, Comment, *IP Video: Putting Control in the Hands of the Consumers*, 14 COMMLAW CONSPECTUS 207, 235 (2005). "[T]he FCC did not develop a significant jurisprudence of Section 1464 until 1970, when it explicitly adopted a broad definition of indecency." Levi, *The FCC's Regulation*, *supra* note 14, at 11.

59 *Pacifica*, 438 U.S. at 729-30. Carlin began his monologue by describing his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." *Id.* at 729.

60 *See* Levi, *The FCC's Regulation*, *supra* note 14, at 11 (noting that the "young son" was, in fact, 15 years old); *see also* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 162-210 (1987) (suggesting that the complaint was part of a political strategy by Morality in Media and that the complainant might not have heard the actual broadcast).

61 *See* Levi, *The FCC's Regulation*, *supra* note 14, at 1.

62 *Pacifica*, 438 U.S. at 748-50; *see also* Whitworth, *supra* note 58, at 235. Notably, the Court in *Pacifica* explicitly stated that it was not ruling on the FCC's general authority to regulate indecency. Instead, the Court was affirming the Commission's regulation against a program as broadcast. *Pacifica*, 438 U.S. at 750-51.

63 Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 90-91 (1992) [hereinafter Levi, *The Hard Case*]; Levi, *The FCC's Regulation*, *supra* note 14, at 11.

the broadcast medium, sexual or excretory activities or organs.[64] The Commission consequently issued three decisions that set forth this new approach to indecency regulation.[65]

During the 1990s, the FCC engaged in more limited indecency enforcement, contrary to what its 1987 decisions might have suggested.[66] The typical amount for indecency fines imposed by the Commission during the second term of the Clinton Administration ranged from $25,000 to $49,000.[67] However, in 2003, the Commission's approach to indecency regulation changed significantly.[68] During the tenure of then-Chairman Michael Powell, the FCC imposed indecency fines totaling $7,928,080 in 2004 alone.[69]

Most recently, under the leadership of former Chairman Kevin Martin, the FCC responded more harshly to indecent audio content on national television broadcasts and terrestrial radio programs.[70] For example, in *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*,[71] the Commission held that the " 'F-word,' even when used as an intensifying adjective or insult, carries inherently sexual connotations and thus will *always* satisfy the first prong of the indecency analysis."[72] The Commission also expressly overturned its *own* prior decisions, finding that "*even isolated uses* of the 'F-word' may violate the second 'patently offensive' prong of indecency analysis."[73] Additionally, the Commission in *Golden Globes* acknowledged a new, independent ground for liability: the use of expletives, regardless of

---

64 *In re* Pacifica Found., Inc., 2 F.C.C.R. 2698, 2699 (1987); *FCC v. Pacifica*, 438 U.S. 726, 732 (1978) (citing *In re* Pacifica Found., 56 F.C.C.2d 94, 98 (1975)).

65 *See In re* Pacifica Found. Inc., 2 F.C.C.R. 2698, 2698 (1987); *In re* Regents of Univ. of Cal., 2 F.C.C.R. 2703, 2703 (1987); *In re* Infinity Broad. Corp. of Pa., 2 F.C.C.R. 2705, 2705 (1987).

66 *See, e.g.*, Keith Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U. L. REV. 1463, 1492-93, 1493 n.180 (2005) (noting that between 1987 and 2001, the FCC issued only 52 fines for indecency).

67 *Id.* at 1493; Levi, *The FCC's Regulation*, *supra* note 14, at 13. The total amount of fines for indecency during the second Clinton Administration seems especially low when compared to the total amount of fines for indecency in 2004 during the Bush Administration and under then-Chairman Michael Powell. *See id.*

68 *See* Levi, *The FCC's Regulation*, *supra* note 14, at 2.

69 *Id.* at 13.

70 *See, e.g.*, Sidak & Singer, *supra* note 26, at 714; *In re* Complaints Against Various Broad. Licenses Regarding Their Airing of the "Golden Globe Awards" Program, Mem. Op. and Order, 19 F.C.C.R. 4975 (2004) [hereinafter Golden Globes Order].

71 *See generally* Golden Globes Order, *supra* note 70.

72 Sidak & Singer, *supra* note 26, at 714-15; *see also* Golden Globes Order, *supra* note 70, at 4979.

73 Golden Globes Order, *supra* note 70, at 4980; Sidak & Singer, *supra* note 26, at 715.

their sexual or excretory connotation, may be "profane'" under section 1464.[74] This new statutory interpretation significantly expanded the "potential liability for terrestrial radio broadcasters, especially for 'shock jock' talk radio[,]" prompting controversial programs to make the move from terrestrial radio to satellite radio.[75]

B. *Satellite Radio and Indecency Regulation by the FCC*

Following the Commission's decision in *Golden Globes*, the FCC continued to increase its indecency enforcement against broadcasters, including terrestrial radio.[76] Additionally, in 2006, Congress passed the Broadcast Decency Enforcement Act, which raised potential fines to $325,000 per violation, or per day for continuing violations.[77]

Despite this increased indecency enforcement, because satellite radio is a subscription-based service similar to direct broadcast satellite ("DBS"), the FCC has explicitly chosen not to apply its broadcast indecency rules to SDARS providers.[78] In a letter to the Commission, Mt.

---

[74] *See* Golden Globes Order, *supra* note 70, at 4981; 18 U.S.C. § 1464 (1994) (prohibiting the broadcast of "obscene, indecent, or profane language"); Sidak & Singer, *supra* note 26, at 715. Subsequently, the Second Circuit vacated the FCC's order in Golden Globes and remanded the proceeding to the agency. *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 446-47 (2d Cir. 2007). On November 1, 2007, the FCC filed a petition for writ of certiorari, requesting that the Supreme Court review the Second Circuit's decision. *See* Tony Mauro, Justices To Examine 'Fleeting' Expletives, First Amendment Center (March 18, 2008), http://www.firstamendmentcenter.org/analysis.aspx?id=19811. The Supreme Court decided to grant review in *FCC v. Fox Television Stations* (07-582) on March 17, 2008. *Id.* The Court issued its decision in *Fox* on April 28, 2009. *See* FCC v. Fox Television Stations, Inc., 556 U.S. —, 129 S. Ct. 1800 (2009). In an opinion authored by Justice Scalia, the Court in *Fox* held that "the Commission's new enforcement policy [which permitted the FCC to treat even isolated uses of sexual and excretory words as actionably indecent] and its order finding the [particular offending] broadcasts actionably indecent were neither arbitrary nor capricious." *Id.* at 1812-13.

[75] *See* Sidak & Singer, *supra* note 26, at 715. Terrestrial radio programs decided to move to satellite radio due to the FCC's decision not to apply its broadcast indecency standards to SDARS providers. *See* Letter from W. Kenneth Ferree, FCC Media Bureau Chief, to Saul Levine, President of Mt. Wilson FM Broadcasters, Inc. (Dec. 14, 2004), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-04-3907A1.pdf (last visited Nov. 16, 2008) [hereinafter Letter from W. Kenneth Ferree]; *see also infra* Part III.B.

[76] *See* Sidak & Singer, *supra* note 26, at 715. For example, Clear Channel Communications received a $495,000 notice of apparent liability for an episode of *The Howard Stern Show*, in addition to a $755,000 notice of apparent liability for a broadcast by radio host "Bubba the Love Sponge." *Id.*; *see also* Sarah McBride, *Clear Channel Dumps Stern After Big Fine*, WALL ST. J., Apr. 9, 2004, at B1.

[77] *See* Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006); Sidak & Singer, *supra* note 26, at 715-16.

[78] *See, e.g., In re* Litig. Recovery Trust, 17 F.C.C.R. 21852, 21856 (2002); *In re* Applications of Harriscope of Chi., Inc., 3 F.C.C.R. 757, 760 n.2 (1988). *See also* Sidak & Singer, *supra* note 26, at 716. Cable also receives "a more relaxed standard of scrutiny" because of "fundamental technological differences between

Wilson FM Broadcasters requested that the FCC subject satellite radio providers to the same indecency standards established in *Pacifica* and promulgated through the years.[79] However, in his reply letter, W. Kenneth Ferree, Media Bureau Chief, declined to extend traditional broadcast indecency regulations to satellite radio because XM and Sirius provide their services on a subscription basis and "[t]he Commission has previously ruled that 'subscription-based services do not call into play the issue of indecency.'"[80]

While the issue of whether the FCC could, in fact, impose its indecency standards on satellite radio is not settled law,[81] the FCC's current decision not to extend its indecency rules to SDARS providers, in part, is based upon the Supreme Court's holding in *United States v. Playboy Entertainment Group*.[82] In *Playboy*, the Supreme Court held that cable operators' content is afforded greater First Amendment protection than broadcast licensees' and thus any regulation of cable content should be subject to strict scrutiny analysis.[83] Because subscription services require consumers to take affirmative steps to bring the video or audio content into their homes or cars, the Commission has held that the services are not as "uniquely pervasive" as traditional broadcast media.[84] Moreover, due to the fact that less restrictive means exist to restrict content through technology such as targeted blocking, the Court held that the particular regulation in *Playboy* did not meet the "narrowly tailored" prong of strict

---

broadcast and cable transmission." Turner Broad. Sys. v. FCC, 512 U.S. 622, 639 (1994).

79 *See* Letter from W. Kenneth Ferree, *supra* note 75.

80 *Id.* (citing *In re* Applications of Harriscope of Chi., Inc., 3 F.C.C.R. 757, 760 n.2 (1988)).

81 *See, e.g.*, Robert Corn-Revere, *Can Broadcast Indecency Regulations be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L.J. 243, 271 (2006) (concluding that "any effort to extend indecency regulation to cable television or other non-broadcast media would be almost certain to fail a constitutional challenge"); Elliott, *supra* note 29, at 283-85 (arguing that industry self-regulation is the appropriate response to indecent content on satellite radio); Phillips, *supra* note 30, at 277-86 (asserting that regulating satellite radio content via traditional broadcast indecency regulations would violate the First Amendment). Satellite radio employs wireless broadcast and might therefore be thought to fall under traditional broadcast law. *See* Danoff, *supra* note 1, at 789 (noting that "[t]he FCC...has more authority to regulate satellite radio than cable because of spectrum considerations"); Matthew S. Schwartz, *A Decent Proposal: The Constitutionality of Indecency Regulation on Cable and Direct Broadcast Satellite Services*, 13 RICH. J.L. & TECH. 17, 120 (2007) (noting that "[t]he cable industry has a stronger defense [against FCC indecency regulation] because cable is by definition non-broadcast and therefore not subject to § 1464, which only applies to 'radio communications'").

82 United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).

83 *Id.* at 804. Strict scrutiny necessitates that regulations must be "narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.*

84 *See id.* at 805; *cf.* FCC v. Pacifica Found., 438 U.S. 726, 727 (1978) (holding that the government has sufficient justification to regulate broadcast media because of its "uniquely pervasive" nature).

scrutiny analysis.[85] In following the Court's holding in *Playboy*, "regulation of [indecent] content delivered through subscription-based multichannel video platforms draws separate treatment by the FCC and heightened First Amendment scrutiny by reviewing courts."[86]

The FCC's decision not to apply traditional broadcast indecency standards to satellite radio providers is most likely also premised upon the fact that, as a subscription-based service, SDARS does not allow for the same "indiscriminate access to children that characterizes [traditional] broadcasting."[87] Additionally, technological advances have permitted satellite radio providers to block specific channels upon consumer request, which is similar to the technology used by satellite television and cable providers.[88] On the other hand, satellite radio operates in the same way as traditional broadcast stations in that both utilize the limited electromagnetic spectrum, while cable and other media do not use the limited spectrum.[89] Because the FCC is charged with allocating spectrum use for the "public interest, convenience, and necessity,"[90] scarcity considerations, historically, have played an important role in the FCC's public interest evaluation.[91] For that reason, the Commission may have a valid argument for regulating SDARS more heavily than, for example, cable.[92]

Notwithstanding the ongoing academic debate, a large quantity of indecent video and audio content has shifted to cable networks, DBS, and

---

85 *See Playboy*, 529 U.S. at 804, 814.

86 Sidak & Singer, *supra* note 26, at 716.

87 *In re* Harriscope of Chi., Inc., 3 F.C.C.R. 757, 760 n.2 (1988) (citing Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985)). *See also* FCC v. Pacifica Found., 438 U.S. 726, 727-28, 748-50 (1978) (noting the "uniquely pervasive presence" of broadcasting and that broadcasting is "uniquely accessible to children.").

88 *See, e.g.*, Elliott, *supra* note 29, at 278-79 (noting that XM and Sirius allowed for selective blocking of channels with request by the subscriber).

89 *See* Levi, *The FCC's Regulation*, *supra* note 14, at 49; David L. Hudson, Jr., Indecency Regulation: Beyond Broadcast?, First Amendment Center (Dec. 5, 2007), http://www.firstamendmentcenter.org/analysis.aspx?id=19408.

90 47 U.S.C. § 302(a) (2000).

91 Nat'l Broad. Co. v. United States, 319 U.S. 190, 216-18 (1943). Because the radio spectrum simply is not large enough to accommodate all applicants, the FCC must be empowered to make decisions in order to allocate the spectrum in furtherance of the public convenience, interest, or necessity. *See id.* at 213, 216-18 ("There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.").

92 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391 (1969) (noting that "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use").

SDARS, where it receives greater First Amendment protection,[93] as a consequence of the FCC's decision that it lacked the authority to regulate indecency on subscription-based services.[94] As the number of "indecent" programs moving to satellite radio continued to grow, politicians and the public[95] lobbied for the FCC to apply its traditional broadcast indecency regulations to satellite radio.[96]

C. *Self-Regulation on Satellite Radio*

Since the FCC explicitly declined to extend traditional broadcast indecency standards to satellite radio providers, satellite radio programs were in large part self-regulated. Prior to the merger approval, both Sirius and XM had been self-regulating their content by taking steps to allow for parental control over the programming available to each satellite radio receiver.[97] By self-regulating, the satellite radio companies were attempting to avoid FCC intervention. The more clearly that Sirius and XM were able to demonstrate that they were providing consumers with the appropriate tools to adjust the content they received based on their own preferences, the less it would appear that the FCC had the authority to impose its own restrictions.[98] Because of this, XM allowed for selective

---

93 *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 804 (2000).

94 *See* Sidak & Singer, *supra* note 26, at 701-02. Notably, in 2004, the chief executive of XM said that the station wanted to become "the HBO of radio," meaning that, in terms of content regulation, satellite radio would receive the same level of First Amendment protection that other subscription-based services, such as HBO, receive. *See id.* at 702. The prominent radio shock jock, Howard Stern, announced on October 6, 2004 that he would be leaving his syndicated morning talk show with Infinity Broadcasting to begin broadcasting on Sirius Satellite Radio. Bill Carter & Jeff Leeds, *Howard Stern Signs Rich Deal in Jump to Satellite Radio*, N.Y. TIMES, Oct. 7, 2004, at A1. Stern decided to make the move to avoid the FCC's heightened indecency enforcement, which included enormous fines for some of the content on his show. *Id.*

95 *See* Levi, *The FCC's Regulation*, *supra* note 14, at 28 (noting that "[a] complementary explanation for the commission's [recent increase in anti-indecency] activity focuses on the increasing pressure brought to bear on the commission both by Congress and by certain private interest groups such as the Parents Television Council."). Whether or not "the public" has actually become more outraged by indecent content on television is not necessarily clear because of a variety of reasons, including the development of form letters generated by the Parents Television Council. *Id.* at 29.

96 *See, e.g.*, *Protecting Children From Violent and Indecent Programming: Hearings Before the S. Comm. on Commerce, Science, and Transp.*, 108th Cong. 5-6 (2004) (statement of Kevin J. Martin, Comm'r, FCC) [hereinafter Martin Statement] (noting that "programming that broadcast networks reject because of concerns about content may end up on competing basic cable networks, and radio personalities that we have fined for indecency violations just move to satellite radio" and because of this "basic indecency and profanity restrictions may be a viable alternative that also should be considered").

97 *See* Elliott, *supra* note 29, at 278-79; Phillips, *supra* note 30, at 281-82.

98 *See* Levi, *The FCC's Regulation*, *supra* note 14, at 34 ("The cable, movie and DBS companies have

blocking of channels by the request of the subscriber.[99] Moreover, channels which XM deemed as having a "high frequency" of explicit language were distinguished by including "XL" on both the channel line-up and receivers.[100] Similarly, Sirius also offered consumers a channel blocking choice.[101]

Although, both Sirius and XM were self-regulating their content by distinguishing channels with explicit content and offering channel-blocking options, critics still did not believe this type of regulation was sufficient. While consumers who did not wish to listen to channels with a high frequency of explicit language could request that certain channels be blocked, these consumers still were effectively required to pay for the blocked channels because they were only offered as part of a large bundled package. Moreover, neither Sirius nor XM offered any "family friendly" package options for consumers who solely wished to listen to music and programs without controversial, indecent content.[102] As a consequence, certain Commissioners, Congressmen, and interest groups believed that the FCC should become involved and commence regulation of indecency on satellite radio.[103]

IV. A LA CARTE PROPOSAL

A. *Former FCC Chairman Kevin Martin's Anti-Indecency and a la Carte Agendas*

Former FCC Chairman Kevin Martin began his crusade against indecent content even before he was appointed Chairman. In 2004, before Congress and elsewhere, Martin contended that there should be a standardized approach in all electronic media regarding indecency and that such an approach should not be deregulatory.[104] Former Chairman

---

recently advised Congress that they are engaging in an unprecedented joint effort to educate the public and to create family-friendly tiers of programming to advance consumer choice. This is likely an attempt to deflect 'a la carte' proposals for cable and other subscription services now sold on a tiered basis.") (footnotes omitted).

99 *See* Elliott, *supra* note 29, at 278. Channel blocking is not available for XM's online service. *Id.*

100 *Id.*

101 *Id.* at 279. Unlike XM, Sirius does not distinguish channels with a high frequency of adult programming. *Id.*

102 *See, e.g.*, Martin Statement, *supra* note 96, at 5-6 (reiterating that "*[i]f cable and satellite operators continue to refuse to offer parents more tools such as family-friendly programming packages*, basic indecency and profanity restrictions may be a viable alternative that also should be considered") (emphasis added).

103 *See id.*

104 *See The Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on*

Martin lobbied both for heavier fines for broadcast indecency,[105] as well as for targeting indecent content airing on the cable and satellite media,[106] which as noted above, are not subject to the same indecency regulations as are broadcasters.[107] Martin called for cable and satellite providers to develop family-friendly programming tiers, without which, Martin advised Congress, the government would intervene and apply traditional broadcast indecency standards.[108] "We need to make the decision to air indecent . . . language a bad business decision," Martin declared when addressing Congress in 2004.[109]

In addition to and complementing his anti-indecency views, Martin expressed his desire that the television industry provide parents with more navigational tools and offer family-friendly programming packages.[110] While observing that "the advances in television and the development of competing providers of video programming have resulted in unprecedented choice for consumers," Martin argued that for families, "the situation can be somewhat of a Catch-22."[111] He noted that if a family subscribed to a multi-channel video programming distributor

---

Telecomm. and the Internet of the H. Comm. on Energy and Commerce, 108th Cong. 68 (2004) (statement of Kevin Martin) (endorsing an extension of indecency regulation to cable and satellite providers); Levi, *The FCC's Regulation*, *supra* note 14, at 49.

105 Todd Shields, *New FCC Chair Kevin Martin Talks Tough*, RADIO MONITOR, Mar. 21, 2005, *available at* http://www.allbusiness.com/services/motion-pictures/4462469-.html.

106 Phillips, *supra* note 30, at 260 ("[P]rior to his appointment as FCC Chairman, Kevin Martin discussed in February 2004 his belief that Congress should consider whether satellite radio and cable television should adhere to the same indecency standards as their broadcast equivalents. Martin explained that broadcasters complain that the 'rules have to be fair to everyone who is in this medium [radio or television],' and stated his own belief that satellite radio content regulation is a 'legitimate issue.'"); *The Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on Telecomm. and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. 68 (2004) (statement of Kevin Martin) (noting that former Chairman Martin has endorsed an extension of indecency regulation to both cable and satellite providers).

107 *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (cable broadcast); Turner Broad. Sys. v. FCC, 512 U.S. 622, 639 (1994) (noting that cable receives a "more relaxed standard of scrutiny" because of "fundamental technological differences between broadcast and cable transmission"); FCC v. Pacifica Found., 438 U.S. 726 (1978) (radio broadcasts); Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985) (distinguishing *Pacifica* from cases in which cable subscriber affirmatively chooses to have cable service come into the home).

108 Shields, *supra* note 105. Whether or not Congress has the authority to regulate indecent content on cable and satellite providers in the same way that it does so in the broadcast medium is debatable. *See supra* Part III.B and accompanying footnotes.

109 Shields, *supra* note 105.

110 Kevin J. Martin, *Family-Friendly Programming: Providing More Tools for Parents*, 55 FED. COMM. L.J. 553, 553-54 (2003).

111 *Id.* at 556.

("MVPD"), the family would receive "a significant selection of high-quality, family-friendly programming, *but also [would be] forced to buy some of the most family-unfriendly programming produced for television*."[112] According to Martin and other supporters, however, if a la carte programming were available, families would be able to benefit from "excellent family-oriented channels" without being required to subscribe to "channels they believe have less appropriate programming."[113]

B. *A la Carte Proposal for Cable and Satellite Television*

In the shadow of the ongoing battle over indecent content, certain members of the Commission and Congress[114] were pushing for cable providers to offer a la carte programming options for their consumers.[115] Currently, cable companies generally offer their channels in bundled basic cable tiers.[116] When cable subscribers wish to receive an "expanded basic tier,"[117] they are forced to purchase one large package of basic cable channels, without the option of customizing their order; this packaging method used by cable companies is similar to the large bundled packages of stations sold by both Sirius and XM.[118] Proponents of a la carte, however, argue that consumers should be able to customize their orders and pick their own cable networks based on their specific content preferences.[119] The proponents consequently assert that consumers would benefit from a la carte programming because they would not be obligated to pay for television shows or radio programs that they had no interest in viewing or found offensive.[120]

This is the basic argument proponents set forth for a la carte channel options for cable and satellite subscribers. Whether or not the FCC

---

112 *Id.* (emphasis added).

113 *See* Shields, *supra* note 105.

114 Former FCC Chairman Kevin Martin, as well as Sen. John McCain, are proponents of a la carte programming. *See, e.g.*, Hazlett, *supra* note 47, at 255 (noting that Sen. John McCain "criticize[d] cable operators for restricting customers' choices").

115 A la carte programming involves consumers selecting specific channels that they would like to receive and then only subscribing to their specific chosen channels. *See* Schwartz, *supra* note 81, at 113.

116 *See* Hazlett, *supra* note 47, at 255.

117 The "expanded basic tier" is in contrast to the "basic tier" or "bare bones" offering, which includes local TV stations. *Id.* at 255 n.2.

118 *Id.* at 255. Channels usually found in the expanded basic tier include USA, WTBS, ESPN, Lifetime, CNN, Fox News, and MTV. *Id.*

119 *Id.* ("If shoppers can choose between apples and oranges at the grocery store, rather than a big bag of both, why shouldn't they be allowed to pick their own cable networks?").

120 *Id.*

should compel cable and satellite providers to supply channels on an a la carte basis was "one of the most hotly contested issues in 2004."[121] Some proponents argued that "monopoly power has resulted in current cable industry pricing policies," while other proponents demanded a la carte directives "to enhance parental control over programming."[122]

Although a 2004 FCC report suggested that a la carte was not desirable for economic reasons and was "a particularly blunt instrument" for regulating indecent content considering other cheaper technical solutions available to consumers to block unwanted content,[123] pressure from many consumer groups and well-known politicians remained on the Commission to enable more control over consumers' cable television options.[124] Similarly, Congress and specific interest groups continued to place increasing pressure on the FCC for stricter enforcement of indecency rules.[125] Notably, a la carte programming had been promoted as a tool that would provide consumers with more control over their programming options and as part of the effort to combat indecency.[126] As a result, in February 2006, then-Chairman Martin and the FCC issued a second report concerning the practicality of a la carte programming, this time *defending the idea* as in the public interest.[127] The "recalculation"[128] in

---

121 Whitworth, *supra* note 58, at 209.

122 Hazlett, *supra* note 47, at 255-56.

123 FED. COMM. COMM'N, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC, 2004 FCC LEXIS 6518 (2004), at *73 [hereinafter FCC REPORT ON A LA CARTE I] ("As a tool to allow subscribers to block objectionable content from reaching their homes, an a la carte requirement seems to be a particularly blunt instrument. Technical solutions that block unwanted content exist today at a lesser cost than a mandated a la carte requirement."). *See also* Hazlett, *supra* note 47, at 289-90; Corn-Revere, *supra* note 81, at 246-47.

124 Whitworth, *supra* note 58, at 209. *See also* FCC REPORT ON A LA CARTE I, *supra* note 123, at *2 ("Earlier this year, several members of the U.S. House of Representatives' Committee on Energy and Commerce wrote to Federal Communications Commission Chairman Michael Powell asking for Commission insight on the 'efficacy of providing a la carte and themed-tier services to cable and satellite subscribers.' Separately, Senator John McCain, Chairman of the United States Senate, Committee on Commerce, Science, and Transportation, asked Chairman Powell to 'explore all available options . . . to promote a la carte and satellite offerings as soon as possible where such offerings would benefit consumers.'") (footnotes omitted).

125 *See* Levi, *The FCC's Regulation*, *supra* note 14, at 28; Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (indicating congressional concern about indecent broadcast programming); Brown & Candeub, *supra* note 66, at 1464-65, 1465 n.8 (noting that "99.9% of the indecency complaints in 2003 were filed by the Parents Television Council").

126 *See, e.g.*, Hazlett, *supra* note 47, at 268; Stephen Labaton, *F.C.C. Chief Prods Pay TV To Help Combat Indecency*, N.Y. TIMES, Nov. 30, 2005, at C3.

127 *See generally* FED. COMM. COMM'N, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVS. TO THE PUBLIC, No. 04-207, 2006 WL 305873 (2006) [hereinafter FCC

the second report permitted the FCC to attempt to make the case for a la carte as "a pro-consumer regulatory policy,"[129] despite the apparent about-face made by the Commission and the lack of objective analysis.

C. *How a la Carte Works*

A la carte pricing involves purchasing channels in smaller increments as compared to the traditional larger bundled packages.[130] The traditional a la carte unit would consist of a monthly subscription to a single program network, but as economist and law professor Thomas W. Hazlett suggests, "unbundling could also be applied to the purchase of program networks for shorter intervals . . . or to the purchase of individual programs."[131] Some proponents of a la carte programming have also proposed an "a la carte light" policy suggestion.[132] Under an a la carte light option, subscription providers offer "a larger number of tiers on which . . . networks are clustered according to genre—news, family, sports, etc."[133] Before being appointed as Chairman, then-Commissioner Martin suggested two paradigms for a la carte programming: "(1) parents could 'opt in' [to] particular satellite radio . . . programs; and (2) customers could choose a specific number of channels from a list of programming for a fixed price."[134]

REPORT ON A LA CARTE II]. *See also* Hazlett, *supra* note 47, at 289-90. "In a fascinating game of regulatory 'gotcha' . . . the [FCC] has issued sharply conflicting reports projecting exactly how a la carte rules would change pricing for cable TV services." *Id.* at 289. The second FCC report "uncovered numerical errors" in the first study and concluded that "'[t]he corrected calculations show that a subscriber could receive as many as 20 channels, including six broadcast signals, without seeing an increase in his or her monthly bill.'" *Id.* at 290.

128 According to a report issued by the House Committee on Energy and Commerce entitled "Deception and Distrust: The Federal Communications Commission Under Chairman Kevin J. Martin," Martin manipulated information given to his fellow commissioners and Congress, specifically involving the findings of the initial a la carte study conducted in 2004. *See* Stephanie Condon, *Congressional Report: FCC Chair Abused Power*, CNET NEWS (Dec. 9, 2008), http://news.cnet.com/8301-13578_3-10119069-38.html?subj=news&tag=2547-1_3-0-20&part=sphere. Martin's reversal of the first report's findings concerning the viability of a la carte provoked suspicion both inside and outside the FCC that the second report was not based on objective analysis. *Id.*

129 *See* Hazlett, *supra* note 47, at 290.

130 *See supra* Part IV.B.

131 Hazlett, *supra* note 47, at 267-68.

132 *Id.* at 267 n.41.

133 *Id.*

134 Danoff, *supra* note 1, at 785; *see Open Forum on Decency Before the S. Comm. on Commerce, Science and Transp.*, 109th Cong. 13-16 (2005) (statement of Kevin J. Martin, Chairman, FCC).

D. *Advantages and Disadvantages*

1. *Advantages*

Generally, supporters of a la carte programming options make two distinct arguments for directives requiring cable operators to provide consumers with the option of purchasing channels on an individual basis. The first argument involves an economic justification, while the second argument involves a social justification.[135] Professor Thomas W. Hazlett points out that these two rationales are "theoretically independent of one another," however in practice "the arguments tend to converge."[136]

In terms of economic justifications, proponents of a la carte pricing assert that it will reduce consumer bills.[137] The idea behind this rationale is that most consumers rarely watch or listen to all of the channels which they are required to purchase under the current bundled packages.[138] Due to this fact, many consumers, who may be on a tighter budget, are currently paying more for these tiered packages in order to receive specific desired channels, but are, at the same time, paying for additional channels that they rarely watch.[139]

In terms of social justifications, proponents argue that a la carte options "will end the flow of unwanted programming, *with offensive content*, into subscribers' homes."[140] The underlying idea behind the social justification argument is that families should not be compelled to support programming which they find distasteful and offensive.[141] When cable customers subscribe to their cable company's tiered programming, they admittedly have some choice, but not nearly as much as the courts seem to presume.[142] Even with options such as channel blocking available to

---

135 *See* Hazlett, *supra* note 47, at 268.

136 *Id.* ("These rationales are theoretically independent of one another. The elimination of unwanted programming may provide a valuable service, such that cable subscribers would be willing to pay more for service with fewer (unwanted) channels. Yet, in practice, the arguments tend to converge. Those who espouse the social justification for a la carte also argue that prices for reduced bundles should be lower.").

137 *Id.* at 268-69.

138 *Id.* at 268.

139 *Id.* at 269 ("Consumers are forced to pay for the added, low value channels because they do not want to give up the whole bundle. Since there is little competition and the competitors offer bundles too, there is no real alternative.").

140 *Id.* at 268 (emphasis added).

141 Hazlett, *supra* note 47, at 269.

142 *See, e.g.*, Action for Children's Television v. FCC, 58 F.3d 654, 660 (D.C. Cir. 1995) (asserting that "[u]nlike cable subscribers, who are offered such options as 'pay-per-view' channels, broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters."); Schwartz, *supra* note 81, at 41.

customers, consumers are nonetheless forced to purchase, and consequently support, channels, which they find objectionable, in order to purchase the channels that they find beneficial.[143] Providing consumers with the option of purchasing channels a la carte would give customers more choices and significantly more control over the programs that enter their homes or cars. With a la carte, customers can purchase only those specific channels that they perceive as beneficial and, thus, obtain increased control over the programs which they and their children view.

2. *Disadvantages*

On the other hand, opponents of a la carte programming offer their own reasons why a la carte pricing is not in consumers' best interest. Two of the opponents' main arguments involve the negative effects on the variety of programming offered by companies and the economic harms of a la carte pricing.

One important reason opponents disfavor unbundling is because of a la carte programming's potential negative effects on the diversity of programming available, specifically programming by various minority groups.[144] Because popular channels financially support less popular channels when they are offered in bundled tiers, consumers are provided with a greater variety of programming options when channels are offered under the current tiers than they would be if the channels were offered on an a la carte basis.[145] If startup and niche programming were not included in the current broad tiers, those channels might not be able to compete with other more "mainstream" channels and, thus, would struggle

---

[143] Press Release, Statement of L. Brent Bozell, III, Founder and President of the Parents Television Council on Cable Choice (May 5, 2004), http://www.cwfa.org/images/content/bozell-cc.pdf ("There is something terribly and fundamentally wrong with requiring consumers to pay for a product they don't want, and may even find offensive, in order to get something they do want. It's like a grocery store telling you that in order to buy a gallon of milk; you also have to buy a six-pack of beer and a carton of cigarettes."); Hazlett, *supra* note 47, at 269.

[144] *See* Michael Grebb, *Cable a la Carte Still Half-Baked*, WIRED NEWS, July 14, 2004, *available at* http://www.wired.com/news/politics/0,1283,64203,00.html; Andrew M. Kulpa, *Distributing Yesterday's Media, Tomorrow: How Media Companies Mask Antiqued Operating Models with the Veil of Copyright*, 16 SETON HALL J. SPORTS & ENT. L. 225, 239 (2006).

[145] *See* Grebb, *supra* note 144; *see also* Kulpa, *supra* note 144, at 239; The Nat'l Cable & Telecomm. Ass'n, *The Pitfalls of A La Carte*, at 1 (2004), *available at* http://www.ncta.com/DocumentBinary.aspx?id=42 [hereinafter NCTA] ("This unprecedented diversity has been made possible by virtue of program packages, or 'tiers.' Tiers combine new networks with well-established networks, thereby allowing new networks to be sampled by consumers so they can find and build an audience.").

financially to survive.[146] As a result, these diverse programming options would disappear from the airwaves, leaving consumers with more of the same programming and fewer diverse choices.[147] It is for this reason that many minority business groups believe that a la carte programming would be "devastating" for program diversity and lead to less choices for consumers.[148]

Additionally, opponents of a la carte assert that it would not lead to economic efficiencies, as the proponents suggest, but that instead a la carte pricing actually would result in higher prices for consumers.[149] Opponents argue that content providers will be forced to raise subscription fees to deal with the loss of potential viewers or listeners under a la carte programming.[150] This would, consequently, result in higher individual channel rates for customers.[151] Furthermore, consumers would have to purchase the necessary equipment in order even to receive the a la carte services, which opponents argue would result in "significant additional equipment costs for millions of consumers."[152] Lastly, requesting households to select the specific channels they will watch or listen to later in the month, or year, is a demanding, time-consuming request, perhaps one which many consumers would not value.[153]

---

146 *See* Grebb, *supra* note 144.

147 *Id.*

148 *See* John Eggerton, *Minority Groups Target Unbundling: Letter to Federal Comm. Comm'n Chairman Kevin Martin Compares Wholesale Program Unbundling with Retail Cable a la Carte*, BROADCASTING & CABLE, May 29, 2008, *available at* http://www.broadcastingcable.com/article/113907-Minority_Groups_Target_Undbundling.php (noting that minority groups argue that "program bundling increases the availability of minority-targeted programming, which boosts investment, which 'yields a higher-quality product.'").

149 Danoff, *supra* note 1, at 785; NCTA, *supra* note 145, at 3.

150 NCTA, *supra* note 145, at 3.

151 *Id.* For example, in a model where a subscriber chose five popular services, such as the Disney Channel, ESPN, MTV, Fox News, and TBS, it was estimated that "the subscriber could actually pay more to purchase only five services a la carte than the cost of a larger tier which included the same five services and many more services as well." *Id.* at 10 (emphasis omitted).

152 *Id.* at 3.

153 Hazlett, *supra* note 47, at 271; *see also* NCTA, *supra* note 145, at 14.

V. REGULATING INDECENT CONTENT THROUGH A LA CARTE PROGRAMMING

A. *What the "Voluntary" a la Carte Merger Condition Actually Means for Consumers*

> Except as otherwise provided in this [Act], the Commission from time to time, as public convenience, interest, or necessity requires, shall . . . prescribe such . . . conditions, *not inconsistent with law*, as may be necessary to carry out the provisions of this [Act].[154]

When the FCC begins its review of a proposed telecommunications merger, often the FCC's approval is the last thing standing in the way of the license-transfer.[155] Under 47 U.S.C. § 310(d), the Commission's licensing authority simply necessitates that the merger be in the "public interest, convenience, and necessity."[156] The statute supplies "little detailed guidance on the structure or standards that should be associated with the review process."[157] Because of procedural loopholes and the fact that many of these "mega-merger license transfers" are worth billions of dollars, the FCC and merger applicants become involved in a "high-stakes regulatory dance" where applicants "volunteer" to abide by specific conditions as the quid pro quo for favorable agency contemplation.[158] As a result, applicants usually are left with no real choice but to submit themselves to this "dance," or risk facing enormous delays or even a complete rejection of the merger.[159] Thus, the resulting "voluntary" conditions hardly can be termed as such, since there appears to be "very little 'voluntariness'" in the process.[160]

---

154 47 U.S.C. § 303(r) (1997) (emphasis added).

155 Tramont, *supra* note 12, at 52. The FCC usually reviews a merger proposal months after the initial plans are announced, and often after the Department of Justice has completed its own antitrust review. *Id.*

156 47 U.S.C. § 310(d) (1996) (detailing that license-transfers depend upon a "finding by the Commission that the public interest, convenience, and necessity will be served thereby.").

157 Tramont, *supra* note 12, at 52. *See also* 47 U.S.C. § 310(d); Blumensaadt, *supra* note 45, at 302 (noting that "[t]he public interest standard is broad and flexible and includes consideration of whether the merger is consistent with the goals of the Communications Act, Commission rules and federal communications policy").

158 Tramont, *supra* note 12, at 52.

159 *Id.*

160 *Id.* at 52-53. Moreover, "[a]bsent judicial or congressional oversight, the Commission has a free hand to impose its view of the public interest without many of the legal or procedural restraints that typically cabin FCC activities." *Id.* at 53. On the other hand, theoretically, the merger conditions can be looked at as "voluntary" because no one is forcing the two companies to merge (although in the case of Sirius and XM, the

Under the leadership of Chairman Martin, the FCC unleashed an unprecedented assault on indecent content in the media.[161] Martin had been both a crusader against indecent content on radio and television as well as an advocate of a la carte options for consumers.[162] The proposed satellite radio merger consequently presented an opportunity for Martin to further his objectives, which he believed to be in the public interest.[163] Martin and the FCC seized this opportunity through the Commission's merger approval contingent on "voluntary" commitments.[164] Understanding the Commission's powerful position as the last hurdle to the proposed merger of the country's only two satellite radio stations, former Chairman Martin and the other two commissioners who approved the merger[165] were able to achieve indirectly what they explicitly claimed they could not do directly, that is regulate indecent content on satellite radio.[166]

This policy goal was accomplished through the a la carte and tiered programming condition.[167] By requiring the newly merged entity to offer smaller family-friendly tiered programming packages at discounted prices,

---

companies claimed that they needed to merge to survive). *See generally* Order, *supra* note 7, at 12389 (noting that Sirius and XM argued that the merger was necessary for satellite radio to survive as neither company had ever turned over a profit). Since the companies are not required to merge, they also are not required to agree to all the conditions that the FCC is encouraging them to accept. Thus, some might argue that the conditions actually are "voluntary." Despite this fact, typically there is a lot of money riding on merger approval and the FCC's review usually takes place at the end of a long, arduous merger review process. *See* Tramont, *supra* note 12, at 52. By the time the Commission reviews the companies' proposed merger, it is usually the last step in a process in which a lot of time and money has been invested by the companies, which places the FCC in a very powerful position because it knows that, at this point, the companies "need" the merger to take place. *Id.* at 52-53, 55-58 (describing how the FCC uses licensees' "vulnerability" to pursue goals outside the traditional policy-making process).

161 *See* Hazlett, *supra* note 47, at 260-61. *See generally* Martin, *supra* note 110 (detailing former Chairman Martin's views concerning indecent content and the need for more family-friendly programming options).

162 *See generally* Martin, *supra* note 110 (elaborating on his views regarding indecency and viability of a la carte options).

163 *Id.*

164 Commissioner Taylor Tate also referred to herself as a "long-time supporter of family-friendly media choices" who "shared the concern of many commenters regarding the level of coarse programming on satellite radio." *See* Order, *supra* note 7, at 12454 (statement of Comm'r Deborah Taylor Tate).

165 Commissioners Deborah Taylor Tate and Robert M. McDowell approved the merger along with Chairman Martin. *See* Order, *supra* note 7, at 12442 (statement of Chairman Kevin J. Martin), 12451 (statement of Comm'r Deborah Taylor Tate), 12456 (statement of Comm'r Robert M. McDowell).

166 Two Commissioners dissented in separate statements. *See* Order, *supra* note 7, at 12443 (dissenting statement of Comm'r Michael J. Copps), 12445 (dissenting statement of Comm'r Jonathan S. Adelstein).

167 *See id.* at 12384-89.

as well as channels on an a la carte basis, the Commission indirectly was able to regulate indecent content on satellite radio, which in accordance with *United States v. Playboy*,[168] has remained unfettered by traditional broadcast radio regulations governing indecent content.[169] Since the imposition of stricter regulations and fines for indecent content on traditional terrestrial radio, there has been a migration to satellite radio of "shock jock" radio hosts, as well as music that was deemed "indecent" according to the new laws.[170] As a result, the Commission probably was frustrated as it saw coarse programming and "shock jocks," such as Howard Stern, slip through its regulatory fingers as such programs gravitated towards satellite radio.[171] However, by imposing the new theme-tiered programming and a la carte requirements as a condition of the Sirius XM Satellite Radio merger, the FCC was able to indirectly regulate the content available to consumers on satellite radio.

In his article detailing how the FCC expands its reach through "voluntary" agreements, Bryan Tramont explained that "when faced with policy goals *[which are] 'obstructed' by statutory or judicial impediments*, the Commission can simply achieve the same goals under the guise of 'voluntary' merger conditions."[172] The Commission, under the leadership of former Chairman Martin, seems to have accomplished just this task in the satellite radio merger. By conditioning the FCC's license-transfer approval upon numerous commitments, the Commission was able to achieve its own policy goals, specifically Chairman Martin's indecency

---

168 529 U.S. 803 (2000). The Court's holding in *Playboy* "signals the Court's unease in applying the *Pacifica* indecency analysis outside the broadcast paradigm." *See* Elliott, *supra* note 29, at 275.

169 *See generally* Order, *supra* note 7 (requiring the newly merged satellite radio station to offer family-friendly tiered programming packages and channels on an a la carte basis); FCC v. Pacifica Found., 438 U.S. 726 (1978) (detailing FCC authority to regulate indecent content on traditional broadcast radio).

170 *See* Elliott, *supra* note 29, at 275-76 (noting that "the flight of programs like Howard Stern's to satellite radio has prompted calls from Congress, the public, and broadcasters to extend the indecency controls to all media, including satellite.").

171 *See, e.g.*, Corn-Revere, *supra* note 81, at 244 ("Before ascending to the chairmanship of the FCC, Commissioner Kevin Martin testified to Congress . . . that '[i]n a world in which more than 85% of homes receive their television programming from cable and satellite providers, we need a comprehensive solution.' He noted that 'programming that broadcast networks reject because of concerns about content may end up on competing basic cable networks, and radio personalities that we have fined for indecency violations just move to satellite radio.'").

172 Tramont, *supra* note 12, at 57-58 (emphasis added) (Tramont's insight is the product of his role as the former Legal Advisor in the office of former Commissioner Harold W. Furchtgott-Roth). *See also* Blumensaadt, *supra* note 45, at 301 (noting that "by the nature of its authority, FCC merger conditions can be used as effective and powerful regulatory tools.").

regulation and a la carte goals,[173] "under the guise of 'voluntary' merger conditions."[174] As a consequence, business decisions such as whether to implement an a la carte programming scheme and whether it would be beneficial to offer smaller theme-based programming packages were removed from the companies' editorial judgment.

However, the FCC is not permitted to use merger-specific conditions as a device to accomplish indirectly what the Commission cannot accomplish directly.[175] Because the FCC had openly stated on numerous occasions that it did not have the authority to regulate indecent content on subscription-based services,[176] including satellite radio, it follows that the Commission should not be able to regulate indecency on satellite radio indirectly through a merger condition mandating tiered-programming and a la carte options. Despite the fact that some would assert that the condition was based more on economic considerations,[177] this mandate was inherently content-based and, if challenged in court, it would receive First Amendment strict scrutiny review and likely be struck down.[178] However, because the tiered-programming and a la carte options were

---

173 Martin's predecessor, former FCC Chairman Michael Powell, also argued for a single indecency standard for First Amendment analysis that "recognize[d] the reality of the media marketplace and respect[ed] the intelligence of American consumers." Reed Hundt, *Regulating Indecency: The Federal Communications Commission's Threat to the First Amendment*, 2005 DUKE L. & TECH. REV. 13, at *6, *6 n.3 (2005).

174 *See* Tramont, *supra* note 12, at 57-58; Hazlett, *supra* note 47, at 260-61 (noting that "[c]urrent reports suggest that FCC Chairman Kevin Martin is pursuing an 'indecency agenda'"). *See generally* Order, *supra* note 7 (listing the "voluntary conditions").

175 *See, e.g.*, 47 U.S.C. § 303(r) (1997) (giving the Commission authority to prescribe conditions "*not inconsistent with law*") (emphasis added). *But see* Tramont, *supra* note 12, at 51-55 (describing ways in which the FCC attempts to evade legal oversight).

176 *See, e.g.*, *In re* Litig. Recovery Trust, 17 F.C.C.R. 21852, 21856 (2002); *In re* Applications of Harriscope of Chi., Inc., 3 F.C.C.R. 757, 760 n.2 (1988) (citing Cruz v. Ferre, 755 F.2d 1415, 1420 (11th Cir. 1985)).

177 *See* Order, *supra* note 7, at 12442 (statement of Chairman Kevin J. Martin) ("I have long believed that consumers should be able to buy and pay for only those channels that they want. Such a free market approach to programming . . . would benefit consumers through lower prices . . . ."). *But see generally* Hazlett, *supra* note 47 (questioning whether a la carte programming is actually in the public interest economically); FCC REPORT ON A LA CARTE I, *supra* note 123 (finding that although an a la carte option would allow consumers to pay for only the programming they choose, few consumers would experience lower bills for multi-channel programming).

178 *See* Corn-Revere, *supra* note 81, at 264 (noting that "even if a la carte or tiering rules were proposed ostensibly to further some economic or other rationale, various cases apply strict scrutiny to such regulations if they impose a discriminatory economic burden on speakers.") (citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)); Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (noting that "the Constitution demands that content-based restrictions on speech be presumed invalid"); United States v. Playboy, 529 U.S. 803, 813 (2000).

imposed via a "voluntary" merger condition accepted by the two parties, challenging the legality of the condition likely would be significantly more difficult, if not impossible.[179] Thus, even though the FCC had continually stated that it did not have the authority to regulate indecent content on subscription-based services, it found a way to effectively evade legal oversight by regulating content on satellite radio through a "voluntary," as well as controversial,[180] merger condition.[181]

B. *The Problems with the Theme-Tiered Programming and a la Carte "Voluntary" Merger Condition and Regulation "Through the Back Door"*

There are many problems associated with the theme-tiered programming and a la carte "voluntary" merger condition, as well as the FCC's indirect regulation of satellite radio, that cause the Commission's actions not to be in the public interest.

To begin with, considering the recent controversy within the FCC itself concerning whether a la carte programming would be economically beneficial to consumers,[182] mandating both the theme-tiered programming and a la carte pricing options was far from a guaranteed

---

[179] *See* Tramont, *supra* note 12, at 52-53 ("When the licensee proposes the 'voluntary conditions' and the Commission adopts them, there is little or no basis for judicial review because the conditions are all characterized as 'voluntary.' Although Congress has questioned the FCC's process at times, it has thus far chosen not to offer a legislative solution to the unpredictable, lengthy, and demanding FCC license-transfer process. Absent judicial or congressional oversight, the Commission has a free hand to impose its view of the public interest without many of the legal or procedural restraints that typically cabin FCC activities.") (footnotes omitted). *See also* Blumensaadt, *supra* note 45, at 301 ("It is significant to note that the conditions are 'voluntary' conditions agreed to by the applicants, so once accepted, it is unlikely that a court will entertain a challenge by the applicants. . . . Thus, by the nature of its authority, FCC merger conditions can be used as effective and powerful regulatory tools.") (footnotes omitted); Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 708 (2009) (asserting that "because the very nature of the [merger-review] proceeding involves 'voluntary' concessions, this type of action is outside the scope of judicial review.").

[180] *See* Order, *supra* note 7, at 12448-49 (dissenting statement of Comm'r Jonathan S. Adelstein) ("A la carte makes its appearance here *without any empirical analysis* or any discussion reflective of the *controversy surrounding the Commission's own a la carte inquiries*.") (emphasis added). *Compare* FCC REPORT ON A LA CARTE I, *supra* note 123 (finding that although an a la carte option would allow consumers to pay for only the programming they choose, few consumers would experience lower bills for multi-channel programming), *with* FCC REPORT ON A LA CARTE II, *supra* note 127 (finding a la carte pricing to be in the public interest).

[181] *See* Tramont, *supra* note 12, at 52-53.

[182] *Compare* FCC REPORT ON A LA CARTE I, *supra* note 123 (finding that although an a la carte option would allow consumers to pay for only the programming they choose, few consumers would experience lower bills for multi-channel programming), *with* FCC REPORT ON A LA CARTE II, *supra* note 127 (finding a la carte pricing to be in the public interest).

public interest benefit of the merger.[183] Moreover, the FCC failed to consider the negative repercussions that could flow from unbundling, such as the possible negative effects of a la carte on the diversity of programming.[184] Maintaining a diverse range of programming options for consumers to choose from is an important public interest concern, and one that has been threatened recently by the latest ownership deregulations which have lead to many media mergers. In fact, one of the significant benefits that satellite radio offered consumers was the diverse, niche channels.[185] A la carte programming, however, will threaten diversity even further because it causes the disappearance of smaller, unique channels that can no longer afford to compete with the more popular, mainstream channels.[186]

By requiring the new family-friendly tiered packages and a la carte options, the Commission could have been hoping that it would be able to force off of satellite radio, or at least make less profitable, the same indecent content that it forced off of terrestrial radio through the imposition of heavy fines.[187] However, channels such as Howard Stern

---

183 *See* Order, *supra* note 7, at 12448 (dissenting statement of Comm'r Jonathan S. Adelstein) ("While the majority accepts the Applicants' 'voluntary commitment' to offer newly defined and a la carte programming packages, the benefits, never mind the merger-specific benefits, of such offerings are far from clear.").

184 *See, e.g., id.* at 12448-49; NCTA, *supra* note 145 (arguing that a la carte programming does not offer any benefit to most consumers and, instead, will result in less choice and less programming diversity); Christopher T. Buckley, *À La Carte v. Channel Bundling: The Debate Over Video Programming Distribution*, 20 LOY. CONSUMER L. REV. 413, 419 (2008) ("In addition, consumer choice would decline as diversity of programming would decrease due to the disappearance of smaller cable channels because of a lack of subscribers. As many smaller cable networks only exist because of the support that more popular networks provide through bundling, à la carte opponents contend bundles 'are not anticonsumer but proconsumer.'") (footnotes omitted).

185 *See, e.g.*, Order, *supra* note 7, at 12349, 12354-56.

186 *See* Buckley, *supra* note 184, at 419. *See also supra* Part IV.D.2.

187 *See* Hazlett, *supra* note 47, at 281 (explaining how offering channels on an a la carte basis rather than bundling channels "'would be the death of independent programmers and [would result in] fewer programming choices for consumers'" because these channels would not be able to survive independently in an a la carte regime). For examples of how the FCC's recent imposition of "draconian fines" has impacted the content of terrestrial radio, see Patricia Cohen, *'Howl' in an Era That Fears Indecency*, N.Y. TIMES, Oct. 4, 2007, at E3 (detailing how poet Allen Ginsburg's famous poem "Howl" only "was heard online and not on the New York radio station WBAI-FM . . . because the station . . . feared that by broadcasting 'Howl' it could run afoul of the [FCC's] interpretation of indecency and incur bankrupting fines."); Jeff Leeds, *Scrambling to Fill a Vacancy After Stern*, N.Y. TIMES, Oct. 6, 2005, at E1 ("[M]any programmers say that since . . . Janet Jackson's notorious Super Bowl 'wardrobe malfunction' touched off a political firestorm over indecency on television, their radio stations have become less willing to broadcast the raunchy content that became the stock-in-trade for many of Mr. Stern's imitators. Sexual jokes and bathroom humor may remain common on morning radio, but many of the personalities considered the most extreme have already been silenced. One of them is

and Playboy engendered huge increases in subscriptions to Sirius,[188] bringing into question whether subscribers to satellite radio would actually value the a la carte options and family-friendly packages.[189]

Additionally, when the FCC chose to regulate indirectly "through the back door" there was a lack of transparency in the process, which in turn undermined the public's confidence in the Commission.[190] If the FCC actually does have the authority to regulate indecent content on satellite radio based on spectrum scarcity considerations or on a new indecency framework,[191] then the Commission should use the traditional administrative law policy-making process to do so. When the FCC originally asserted that it could not regulate indecency on satellite radio, but then decided to regulate that same content on satellite radio indirectly through the imposition of "voluntary" conditions attached to its structural review, the Commission both undermined its authority and also avoided procedural and constitutional oversight.[192]

Bubba the Love Sponge, a radio host based in Tampa, Fla., who was fired by Clear Channel Communications last year after the [FCC] imposed a record $755,000 fine against the company for his show's graphic discussion of sex. (Bubba recently signed on to appear on one of Mr. Stern's two channels on Sirius.)").

188 *See* Eric A. Taub, *Merger on Horizon for Satellite Radio Listener Numbers Have Rocketed, But Stock Prices Have Tumbled*, INT'L HERALD TRIB., Jan. 3, 2007, at 13 ("The debut last year of Howard Stern's radio show on Sirius Satellite Radio put the technology on the map, raising the public's awareness of satellite radio and helping to significantly increase subscriber totals for Sirius and its larger rival, XM Satellite Radio. Today, thanks in part to the outsize radio personality, the Stern Effect has increased Sirius's base to about 6 million subscribers, up 80 percent from one year ago."); *see also* Danoff, *supra* note 1, at 789 ("The plain truth is that the FCC imposed a tremendous amount of fines on Howard Stern. Howard then left broadcast media and his audience—half of six million—followed!").

189 *See* Hazlett, *supra* note 47, at 292 (noting that "[t]he reality is that [family-friendly] packages, while offering a potential political solution, would be rarely used by actual consumers.").

190 *See generally* Tramont, *supra* note 12 (detailing how the FCC expands its power through "voluntary" agreements that "emerge from an elaborate and often secret process of demands and 'negotiations'"); Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics From Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, 18 PHOENIX CENTER POL'Y BULL. 1 (2007), *available at* http://www.phoenix-center.org/pcpb.html. *See also* Weiser, *supra* note 179, at 678 ("In the case of the FCC, its current lack of data-driven decisionmaking and emphasis on political dealing hinders the thoughtfulness of its analysis, limits its ability to address issues effectively, and invites a cynical attitude toward government.").

191 *See* Phillips, *supra* note 30, at 277-85 (noting that "[a]s a communication medium, satellite radio is not equivalent to broadcast media."). *But see id.* at 286 (noting that "[d]espite this constitutional analysis, Congress may move forward with a content-based regulation that restricts indecent content on satellite radio.").

192 *See* Corn-Revere, *supra* note 81, at 263 ("Although a la carte requirements have been put forward in the past as a form a rate regulation, more recent proposals are *overtly framed as measures to control programming content* as well.") (emphasis added); *see also* Weiser, *supra* note 179, at 708 ("Technically speaking, [the merger-review] proceedings are adjudications, but practically speaking, they are often negotiations where the FCC

First Amendment problems also exist with the FCC's decision to indirectly regulate content on satellite radio. By requiring the newly merged satellite radio company to offer a la carte and family friendly programming as a condition of the merger, the FCC intruded upon the newly merged company's editorial judgment concerning the mix of programming services and how the channels should be bundled.[193] In accordance with *Playboy*, content on satellite radio should receive greater First Amendment protection.[194] However, the Commission diluted this First Amendment protection with the a la carte and family-friendly programming condition. Because the content on satellite radio is given greater First Amendment protection, the decision whether to air programs that might be regarded as indecent by some members of the public should be within the business judgment of the company. As noted earlier, the conditions are theoretically "voluntary" and the companies did not have to merge, meaning that they did not have to agree to these conditions;[195] on the other hand, at the time the conditions were proposed, in theory the companies "had" to merge—Sirius and XM had invested an enormous amount of time and money into the proposed merger and likely were willing to agree to almost anything to close the deal.[196]

Moreover, the Commission took advantage of the vulnerable position in which both Sirius and XM found themselves.[197] The DOJ had already approved the merger so the FCC's approval of the license-transfer was the only obstacle standing in the proposed entity's way. In this case, the FCC took an especially long time to review the proposed merger, thus leaving

---

seeks to leverage its authority to approve the merger to obtain concessions that often have little or nothing to do with the competitive issues raised by the transaction.").

193 *See* Corn-Revere, *supra* note 81, at 263-64 ("Although a la carte requirements have been put forward in the past as a form of rate regulation, more recent proposals are *overtly framed as measures to control programming content* as well. In any event, proposals to require operators to construct 'family-friendly' tiers cannot be disguised as rate regulation. *Such proposals are, by definition, motivated by content-based considerations.* . . . Such measures necessarily would *intrude on cable operators' editorial choices* regarding the mix of programming services to offer and how they should be bundled.") (emphasis added) (footnotes omitted).

194 *See* United States v. Playboy Entm't. Group, Inc., 529 U.S. 803, 805 (2000) (explaining that subscription services are not as uniquely pervasive as traditional broadcast media because subscription services require consumers to take affirmative steps to bring content into their homes or cars).

195 *See supra* note 160 and accompanying text.

196 *See* Tramont, *supra* note 12, at 52, 57 (explaining how the FCC's approval was the last thing standing in the way of the proposed merger); *see generally* Order, *supra* note 7, at 12348, 12358 (noting that Sirius and XM came to the FCC seeking approval in February 2007, but the merger was not approved until July 2008).

197 *See* Tramont, *supra* note 12, at 51; *see also* Order, *supra* note 7, at 12389 (noting that "both Sirius and XM have experienced billions of dollars in losses and that neither company has ever turned a profit").

the transaction hanging in the balance.[198] It is no coincidence that this merger ended up being "one of the most heavily-conditioned in FCC history."[199] The Commission took so long to approve the merger contingent upon all of the "voluntary" conditions that it desired, that when the license-transfer approval was ultimately granted, it might have been too late.[200] Sirius XM most likely did not anticipate the FCC taking an entire year and a half to approve the license-transfer, thus leaving the newly merged entity in the midst of an economic downfall which in turn caused some of satellite radio's biggest partners, the automakers in Detroit, to become among the hardest hit.[201] With Sirius XM coming close to filing for bankruptcy and perhaps ceasing to exist, it is not clear that the public interest *really* is benefiting from the merger. By delaying the merger approval so long in order to attempt to advance the Commission's own ideological policy agenda, the FCC almost rid the airwaves of satellite radio itself. Today, as a consequence, a new technology that had enormous potential to redefine the competitive landscape, instead, continues to struggle to exist.

VI. CONCLUSION

By mandating the a la carte and family-friendly programming packages condition, the FCC may have ended the debate about whether the Commission has the power to regulate indecency directly on satellite radio. Because the newly merged entity now is required to provide family-friendly packages and the option to purchase channels on an a la carte basis, those alleging that the FCC has the authority to regulate content on SDARS face an uphill battle because the a la carte and family-friendly packages provide a "less restrictive alternative" than applying the

---

198 *See generally* Order, *supra* note 7 (explaining how Sirius and XM came to the FCC seeking approval in February 2007, but the merger was not approved by the FCC until July 2008). *See also* Tramont, *supra* note 12, at 57.

199 *See* Order, *supra* note 7, at 12456 (statement of Comm'r Robert M. McDowell).

200 *See, e.g.*, Tim Arango, *Satellite Radio Still Reaches for the Payday*, N.Y. TIMES, Dec. 28, 2008, at BU1 ("Today, five months after regulators approved a merger of Sirius and XM, satellite radio's pioneers and former rivals, in a deal that was supposed to deliver their industry to the promised land of profits and permanence, the company faces an uncertain future."). In fact, Sirius XM recently was forced to enter an investment deal with Liberty Media, the owner of DirecTV to help "the beleaguered satellite radio company stave off a default on some of its bonds and a potential bankruptcy filing." *See* de la Merced, *supra* note 15, at B5.

201 *See* Arango, *supra* note 200, at BU1 (noting that "the bulk of new satellite radio subscribers come from partnerships with automakers").

traditional broadcast indecency regulations to satellite radio. Moreover, because the conditions were "voluntary" and agreed to by the parties, challenging the legality of the condition will likely be significantly more difficult.[202] If the Commission continues to maintain the distinction between broadcast media and subscription-based services, such as satellite radio, due to the fact that SDARS providers offer methods for consumers to limit their exposure to indecent content, as well as perhaps benefitting economically by not paying for channels that they elect to block, an extension of *Pacifica* to satellite radio now seems highly unlikely.

By taking advantage of the vulnerability of the satellite radio companies when they arrived at the FCC seeking merger approval in order to advance the Commission's larger anti-indecency agenda, the Commission delayed a merger to the disadvantage of the public interest, undermined public confidence in the FCC, and avoided the procedural and perhaps constitutional problems it might have encountered had the FCC followed the proper administrative law process. Only time will tell what will be the fate of both indecent content on satellite radio and of Sirius XM itself.

---

202 *See supra* note 179 and accompanying text.