The go-ahead for the merger of Sirius and XM is the embodiment of Bush-Cheney capitalism, which reflexively favors shareholders over consumers.

(By Daniel Acker -- Bloomberg News)

For the past several years, these two companies have been competing so hard for talent, distribution channels and customers that neither has been able to turn a profit, and probably wouldn't have for years. Consumers have been the big winners, with great programming at affordable prices.

All that is about to change now that the Bush administration has concluded that we'll all be better off if these heretofore fierce rivals are allowed to stop competing and concentrate instead on reducing costs, paring down their combined offerings and finally delivering profit to their shareholders.

It took some doing -- and more than a year of "investigation" -- for the Justice Department to come up with its undisclosed evidence and tortured logic to justify this strikingly anti-consumer decision. As precedent, it could be used to justify the merger of...
ABC with both CBS and NBC, Clear Channel with the Bonneville radio network or even Coke with Pepsi.

The message it sends to business executives is clear: If you find yourself in a tough competitive environment, the best strategy is not to find a way to offer better products and services at a better price, but rather to call your investment banker and negotiate a truce with your biggest rival.

The essence of the decision announced Monday by Thomas Barnett, the head of the Justice Department's antitrust division, is that, contrary to all appearances, XM and Sirius really don't compete much with each other.

One reason, according to Barnett, is that when you buy a new car, you don't have a choice of whether to install an XM or Sirius radio. That's because the two radio services have negotiated exclusive contracts with all the major carmakers, who in many cases have cemented these relationships by taking equity stakes in XM and Sirius.

Now you might think that if the Justice Department were doing its job all along, it would have stepped in to prevent these kind of exclusive relationships, which in the long run tend to raise prices and restrict consumer choice. You would particularly want that kind of vigilance in the case of a government-sanctioned duopoly, which is how the Federal Communications Commission viewed XM and Sirius when it granted only two licenses for satellite radio.

But not Tom Barnett. Not only did he turn a blind eye to such "vertical restraints," but now uses them as a justification for approving the XM-Sirius merger, arguing that they eliminated whatever competition once existed in the auto "channel" of the satellite radio market.

The second argument Barnett puts forward is that while some of us consider XM and Sirius as next-best substitutes for each other, most people do not. This apparently is based on "empirical evidence" that consumers chose one or the other service for its exclusive program offerings -- baseball or football or Howard Stern or Oprah -- that aren't available from the rival service. So the choice isn't between XM and Sirius, according to Barnett, but between XM or Sirius and nothing at all.

Anyone in business, of course, will recognize this as a static view of how competition is waged -- it's as if you divide the world into Pepsi people and Coke people and declare the competition over.

It makes no allowance for the possibility that, if you force the two companies to compete, XM might come up with a morning host who is funnier and more outrageous than Howard Stern. Or Sirius, lacking a Major League Baseball offering, might take a chance on World Cup soccer or college lacrosse and tap into a whole new audience that nobody knew existed. The prospects for that kind of innovation will be greatly reduced after XM and Sirius merge and the combined company focuses on protecting its existing hit channels rather than creating new ones to displace them.

Perhaps the silliest of Barnett's arguments is that, since XM and Sirius really don't compete for customers, there will be no real loss of pricing competition after they merge.

As a matter of first impression, it's hard to square that analysis with the fact that both companies charge $12.95 for basic monthly service.

Nor is it particularly convincing that the new XM Sirius will be forced to hold down its prices because of competition from traditional AM-FM radio, iPods and MP3 players and, within a few years, streaming Internet radio delivered over all manner of portable devices.

Obviously, all of these are forms of audio entertainment, just as trucks, trains and airplanes are all ways of moving freight around the country. But that doesn't mean that they are such perfect substitutes for one another that we need not worry if there were only one trucking firm, only one train line and one airline.
In the case of AM-FM radio, or even Internet radio, these are services that get their revenue from advertisers rather than listeners, so it's hard to see how they impose much pricing discipline on XM or Sirius. Obviously, consumers have to make trade-offs in deciding between free service interrupted constantly by advertising and a higher-quality subscription service with few or no commercial interruptions. But that's a loose and indirect form of pricing discipline that in the case of TV cable rates, for example, has yielded unimpressive results.

Nor are those iPods and MP3 players ready substitutes for satellite radio. Although they deliver you the music you like and want, you have to know exactly what music you want (as opposed to having a knowledgeable disc jockey choose it for you) and take the time to download it. Even then, you're going to spend way more than $12.95 a month to get the kind of variety offered by satellite radio. And if it's live broadcasts of news and sports you're looking for, then iPods and MP3 players are not much of a substitute and offer no pricing discipline at all.

XM-Sirius is the latest in a long series of cop-outs by the antitrust police, but it's also more than that. As an unregulated monopoly, it is the perfect embodiment of Bush-Cheney capitalism -- a capitalism that reflexively favors shareholders over consumers, rewards financial manipulation over genuine innovation and is never shy about harnessing the power of government to the service of private interests.