



PUBLIC NOTICE

Federal Communications Commission
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DA 09-529

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MEDIA BUREAU SEEKS COMMENT ON IMPLEMENTATION OF SIRIUS-XM MERGER CONDITION THAT FOUR PERCENT OF AUDIO CHANNELS BE LEASED TO QUALIFIED ENTITIES AND EXTENDS THE DEADLINE FOR COMPLIANCE WITH THIS CONDITION

MB DOCKET NO. 07-57

Comment Date: March 30, 2009

Reply Comment Date: April 14, 2009

1. In approving the transfer of control of licenses and authorizations held by Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM,” or jointly, the “Applicants”),¹ the Commission accepted the Applicants’ voluntary commitment to enter into long-term leases or other agreements to provide a Qualified Entity or Entities² with rights to four percent of the full-time audio channels on the Sirius platform and four percent of the full-time channels on the XM platform (“Third-Party Access Commitment”).³ The Applicants committed to entering into these third-party leases within four months of the consummation of the merger.⁴ The Commission concluded that the Third-Party Access Commitment would “further the Commission’s goals of fostering competition and diversity on the

¹ The Applicants provide satellite digital audio radio services (“SDARS”).

² *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, 23 FCC Rcd 12348, 12408, ¶ 131 (2008) (“*Sirius-XM Order*”). A “Qualified Entity” includes an entity that is majority-owned by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics. *Id.* at 12409, ¶ 134 n.437.

³ Four percent of the full-time audio channels currently represents six channels on the Sirius platform and six channels on the XM platform, for a total of 12 full-time audio channels. The Applicants stated that, as digital compression technology enables the combined company to broadcast additional full-time audio channels, it will ensure that a Qualified Entity or Entities continue to have access to four percent of full-time audio channels on the Sirius platform and on the XM platform, and in no event will the combined company reserve fewer than six channels on the Sirius platform and six channels on the XM platform. *Id.* at 12409-10, ¶ 134; *Id.* at 12434-35, App. B.

⁴ *Id.* at 23 FCC Rcd at 12409-10, ¶ 134. The merger was consummated on July 28, 2008. See Letter from Jennifer D. Hindin, Wiley Rein LLP, on behalf of Applicants, to Marlene H. Dortch, Secretary, FCC (Aug. 20, 2008). The initial deadline for compliance with the Third Party Access Commitment was Nov. 28, 2008, which was extended until Feb. 27, 2009. See *infra* note 8.

SDARS platform,”⁵ and adopted the Applicants’ commitment as a condition to its grant of the license transfer applications.⁶

2. The Commission did not, however, provide all of the details necessary for implementation of this condition, and stated that it would determine the implementation details at a later date.⁷ The Media Bureau, on its own motion, extended the deadline for the Third-Party Access Commitment from November 28, 2008, until February 27, 2009 to further consider implementation details.⁸

3. In order to establish procedures for implementing the Third-Party Access Commitment, we now seek comment on a range of implementation issues, including the definition of a Qualified Entity or Entities, the process for establishing eligibility, the technical⁹ and financial qualifications of lessees, the criteria for selecting among competing applicants where demand exceeds supply,¹⁰ the technical aspects of allocating capacity to lessees,¹¹ the duration of the “long-term” lease, as well as other terms and conditions of service. We also invite interested parties to comment on whether there should be a single lessee or multiple lessees and, if more than one, how much capacity should be allocated to any single lessee. In addition, we note that the Applicants indicated that the merged entity, Sirius XM Radio Inc. (“Sirius XM”), “is willing not to be involved in the selection” of the lessees.¹² We seek comment on whether Sirius XM should select or be involved in the selection of the lessees and how the involvement of Sirius XM in the selection process would enhance overall the spectrum leasing arrangements.¹³ If Sirius XM should not select or be involved in the selection of the lessees, we invite comment on who should make the selection, such as an independent trustee.

4. To afford the Commission time to consider the comments submitted in response to the Public Notice, determine how the condition is to be implemented, and afford Sirius XM and potential lessees sufficient time to negotiate and enter into leases, we find it necessary to further extend the Third-Party Access Commitment compliance deadline until May 29, 2009.

⁵ *Sirius-XM Order*, 23 FCC Rcd at 12408, ¶ 131.

⁶ *Id.* at 12352-53, ¶ 7.

⁷ *Id.* at 12411, ¶ 135 and n.444.

⁸ *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Order, DA 08-2620 (MB, rel. Nov. 28, 2008).

⁹ Technical qualifications could include, for example, minimum programming and production experience.

¹⁰ Interested entities should comment on how lessees should be selected from a pool of qualifying applicants, such as a first-come, first-served approach, lottery, or other selection process.

¹¹ For example, should capacity be allocated to lessees in bit rates, bandwidth, or channels?

¹² *Sirius-XM Order*, 23 FCC Rcd at 12435, App. B.

¹³ For example, Sirius XM could ensure that each lessee’s programming is compatible with Sirius XM’s platforms.

I. PROCEDURAL MATTERS

A. Ex Parte Rules

5. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under section 1.1206(b) of the Commission’s rules.¹⁴ *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.¹⁵ Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

B. Filing Requirements

6. *Comments and Replies.* Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,¹⁶ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (“ECFS”), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies.¹⁷

7. *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message: “get form.” A sample form and directions will be sent in response.

8. *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission. The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail)

¹⁴ See 47 C.F.R. § 1.1206(b); see also 47 C.F.R. §§ 1.1202, 1.1203.

¹⁵ See 47 C.F.R. § 1.1206(b)(2).

¹⁶ See 47 C.F.R. §§ 1.415, 1.419.

¹⁷ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington, DC 20554.

9. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, CY-A257, Washington, DC 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word, and/or Portable Document Format (PDF).

10. *Accessibility Information.* To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: <http://www.fcc.gov>.

11. *Contact Information.* For additional information, contact Elvis Stumbergs or Kristi Thompson, at (202) 418-2330, Media Bureau, Industry Analysis Division. Press inquiries should be directed to David Fiske at (202) 418-0513. TTY: (202) 418-7172 or (888) 835-5322.

By the Chief, Media Bureau

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