

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: The Commission

OPPOSITION OF RSS NETWORK CORP. TO PETITION TO DENY

RSS Network Corp. (“RSS”), by its attorneys and pursuant to Section 1.106(g) of the Commission’s Rules, 47 C.F.R. § 1.106(g), hereby opposes the petition for reconsideration that Minority Media and Telecommunications Council (“MMTC”) filed in response to the Commission’s October 19, 2010 Memorandum Opinion and Order in the above-captioned proceeding.¹ MMTC seeks reconsideration or clarification of the *Order*, finding it flawed in three respects.²

RSS is clearly a party to the proceeding, having filed comments and reply comments in response to the Commission’s February 27, 2009 Public Notice (DA 09-529) in the above-captioned proceeding,³ along with multiple *ex parte* presentations, and its positions are duly reflected in the *Order*. MMTC, by contrast, does not appear to have been a party to the post-

¹ *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, FCC 10-184 (released October 19, 2010) (“*Order*”).

² MMTC Petition at 1.

³ *See 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*, Public Notice, DA 09-529, MB Docket No. 07-57 (Media Bur. released Feb. 27, 2009) (“*Notice*”).

merger deliberations and proceedings over the Third-Party Access Commitment. While MMTC claims to be aggrieved by “the diminution of programming diversity that would follow in the wake of a decision ...” that denies the MMTC Petition,⁴ it does not appear to provide any reason why it was unable to participate in the extended deliberations over the Third-Party Access Commitment made by Sirius XM Radio, Inc. (“Sirius XM”) that the Commission embraced in the 2008 merger order in this proceeding.⁵ MMTC is not among the dozen or so entities that provided comments to the Commission on the implementation approaches.⁶

At the outset then, RSS submits that MMTC has failed to establish that it has standing at this juncture to petition for reconsideration of the *Order*. RSS also notes that MMTC has failed to comply with the requirement of Section 1.106(f) of the Commission’s Rules, 47 C.F.R. § 1.106(f), which requires that petitions for reconsideration “shall be served upon parties to the proceeding.” MMTC apparently provided service upon Sirius XM, but not upon any of the other parties such as RSS that duly participated in the deliberations over the Third-Party Access Commitment since 2008. The MMTC Petition should thus be dismissed.

If the Commission decides to treat the MMTC Petition on the merits, RSS has no serious objection to MMTC’s request that the Commission clarify its definition of “relationship” to provide Sirius XM guidance on the types of pre-existing relationship between a putative lessee and Sirius XM that would be disqualifying to a lessee under the *Order*.⁷ Nor does RSS object to

⁴ *Id.* at 2.

⁵ It is well established that a failure to anticipate an outcome of a proceeding is not sufficient cause to accord an entity standing under Section 1.106(b)(1) of the Commission’s Rules, 47 C.F.R. § 1.106(b)(1). *See, e.g., AT&T Corp. v. BellSouth Telecommunications, Inc.*, Order on Reconsideration, 20 FCC Rcd 8578, 8579 (2005) (“[S]urprise’ at the outcome of a Commission proceeding does not ordinarily excuse a failure to attempt to participate earlier in the proceeding.”) (footnote omitted).

⁶ *See Order*, FCC 10-184, slip op. at 3 & n.8.

⁷ *See* MMTC Petition at 5.

MMTC's request for a statement that the definition of "qualified entity" the Commission adopted in the *Order* be confined to the instant proceeding.⁸ In both cases, however, RSS's acquiescence to the clarifications sought by MMTC is strictly conditioned on the granting of relief not leading to any additional delays in the oft-delayed implementation of the Third-Party Access Commitment or the schedule adopted in the *Order* that calls for final leases to be issued by April 17, 2011.

RSS does, however, oppose MMTC's request that the Commission, on reconsideration, instruct Sirius XM to afford "special consideration" to entities that will promote diversity by virtue of "non-racial factors such as their educational mission, language, or Native American status."⁹ As far as RSS can tell, MMTC offers no inkling of what it means by "special consideration." Moreover, RSS, which would benefit from a race-based classification as a 100-percent Hispanic-owned entity or a language-based classification as a Spanish-language programmer, is skeptical that the classifications MMTC urges could reasonably be found to be non-racial or race-neutral. Finally, RSS would object strongly to any embrace of the notion, inferred from MMTC's Petition, that an entity that meets more than one of the three categories eligible for special consideration would be entitled to more special consideration than an entity that meets only one. In this last regard, MMTC offers no demonstration that an entity that both offers non-English programming and is Native American-owned, for example, would promote programming diversity in a manner superior to an entity serves a non-English-speaking audience but has no Native American or treaty-based connections.

⁸ *Id.* at 7-8.

⁹ *Id.* at 5-6.

In the *Order*, the Commission struck the proper balance in its definition of the term “qualified entities.” The vague and ill-defined request in the MMTC Petition could drag the Commission, Sirius XM, and the putative lessees back into the constitutional quagmire the Commission strove to avoid in its *Order*.¹⁰ RSS and perhaps other entities are, after years of delay, finally preparing to achieve the Commission’s objective of promoting source, viewpoint, and programming diversity over the satellite radio platforms operated by Sirius XM. The Commission should reject MMTC’s request as a flawed proposal that would stop that achievement in its tracks.

For the reasons stated above, RSS urges the Commission to dismiss the MMTC Petition as defective under Section 1.106 of the Commission’s Rules. Should the Commission reach MMTC’s Petition on its merits, RSS urges the Commission to deny MMTC’s vague and unjustified proposal to award “special considerations” to certain race-impacted categories of putative lessees, and to grant any other MMTC clarification requests only if the implementation schedule specified in the *Order* is unaffected.

Respectfully submitted,

RSS NETWORK CORP.

By: /s/ Stephen D. Baruch

Raul R. Rodriguez
Stephen D. Baruch

Lerman Senter PLLC
2000 K Street, NW, Suite 600
Washington, DC 20006-1809
Tel. (202) 429-8970

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Its Attorneys

¹⁰ *Order*, FCC 10-184, slip op. at 2.

CERTIFICATE OF SERVICE

I, Cynthia Forrester, hereby certify that a copy of the foregoing Opposition of RSS Network Corp. to Petition to Deny was served this 1st day of December 2010, by First-Class U.S. Mail, to the following:

David Honig
President and Executive Director
Minority Media and Telecommunications Council
3636 16th Street, N.W.
Suite B-366
Washington, DC 20010

Robert Pettit, Esq.
Partner
Wiley Rein, LLP
1776 K Street, N.W.
Washington, DC 20006
Counsel for Sirius XM Radio, Inc.

Michael Schueppert
Chief Executive Officer
FluteRadio LLC
6115-D Edloe Street
Houston, TX 77005

Randolph J. May
President
The Free State Foundation
P.O. Box 60680
Potomac, MD 20859

Parul P. Desai
Andrew Jay Schwartzman
Media Access Project
Suite 1000
1625 K Street, NW
Washington, DC 20006

Gloria Penn-Easton
Mosaic Communications Partners, LLC
2919 17th Avenue, Suite 205
Longmont, CO 80503

Malik Shakur
Independent Creative Artists
264 S. La Cienega Blvd
Suite 565
Beverly Hills, CA 90211

Jeneba Jalloh Ghatt
The Ghatt Law Group
2 Wisconsin Circle, Suite 700
Chevy Chase, MD 20815
Counsel for iClick2Media, Inc. and Alphastar International

W. Kenneth Ferree, President
Adam Thierer
The Progress & Freedom Foundation
1441 I Street, NW, Suite 500
Washington, DC 20005

Linda J. Vilaro
Chief Administrative Officer and Vice President
Radio One, Inc.
5900 Princess Garden Parkway
7th Floor
Lanham, MD 20706

Barry A. Friedman
Thompson Hine LLP
1920 N Street, NW
Suite 800
Washington, DC 20036
Counsel for Entravision Communications Corporation

Rudolph J. Geist
Clare C. Liedquist
RJGLaw LLC
7910 Woodmont Avenue, Suite 1400
Bethesda, MD 20814
*Counsel for Hispanic Information and
Telecommunications Network, Inc.*

Julian L. Shepard
Benjamin D. Arden
Williams Mullen
1666 K Street, NW
Suite 1200
Washington, DC 20006
Counsel for NY Metro Radio Korea Inc.

John Pavlica, Jr.
3638 Elmhurst Rd.
Toledo, OH 43613

Patrick Sharpless
1839 Ygnacio Valley Rd. #368
Walnut Creek, CA 94598-3214

/s/ Cynthia Forrester
Cynthia Forrester