



Friday, November 12, 2010

VIA ELETRONIC FILING

Marlene H. Dortch
Secretary
Federal Communication Commission
224 12 Street S.W.
Washington, D.C. 20554

RE: iClick2Media's OPINION ON the MEMORANDUM OPINION AND ORDER 07-57 Adopted:
October 18, 2010 Released October 19, 2010

Dear Ms. Dortch:

I applaud your efforts in finding a solution that included all the active parties ideas, and concepts on the docket. Though you did not adopt any of AIR's ideas and concepts per say the fact that you saw the importance of including parts of AIR's objectives is clear our concept for the 24 channels is on the right path: Some of those points include:

*Qualified Entity Definition*¹

- To minimize the possibility of litigation regarding the constitutionality of the definition of a Qualified Entity, which could delay implementation of this important public interest benefit, we have decided to define "Qualified Entity" in this Order in a manner that is **race-neutral**.

*Transparent Selection Process*²

- Although we do not adopt AIR's specific proposals, we require Sirius XM to file with the Commission within 30 days of release of this Order a notification that identifies **a public website** or similarly accessible source where the following information relating to the application process will be available to the public: (1) the definition of Qualified Entity as provided herein; (2) the deadline and procedures for submitting applications; (3) any specific information that it will require applicants to submit; and (4) any specific application criteria that Sirius XM intends to apply in its review of potential lessees...The specific application criteria must be open to all entities that meet the definition of a Qualified Entity and cannot place limits on who can apply.

*Capacity Allocation*³

- Second, the limitation is sufficiently generous that it will permit a lessee to acquire enough channels to accommodate business plans dependent on programming more than a single channel and allow a single lessee to provide a variety of high-quality, diverse programming that is not otherwise available to SDARS subscribers and may attract new subscribers and enhance the commercial viability of SDARS. Sirius XM may also elect to lease a single channel to more than

¹ *In the matter of Applications for consent of control of Licenses XM Satellite Radio Transferor To Sirius Satellite Radio Inc Transferee Memorandum Opinion and Order* FCC 10-184

² *Id*

³ *Id*

one lessee, thereby increasing the number of distinct voices, as some commenters suggest.

Capacity Calculation

- In response, commenters generally characterize the leased capacity in terms of “channels.

Implementation Details

- DBS operators make NCE channels “available” by including the channels on every tier or programming package at no additional charge. Consistent with this approach, we require that the leased channels be part of every compatible package or tier 98 provided to Sirius XM subscribers, to the extent technically feasible, including Internet subscribers as AIR suggests, and that Sirius XM not assess an additional charge for the receipt of these channels.

Indemnification

- AIR, Entravision, and Radio One assert that Sirius XM should be indemnified for its implementation of the Leasing Condition. We agree and conclude that Sirius XM should be permitted to require lessees to indemnify Sirius XM against liability arising from their conduct as lessees. We believe that private negotiation is the best means to implement the indemnification requirement in this context and therefore decline to adopt specific conditions or limits regarding the type of contractual indemnification agreement or the amount of coverage or the type of insurance policy that Sirius XM may require. Consistent with our approach in cable leased access, however, we will require that insurance and indemnification requirements be reasonable in relation to the equitable objective of limiting the liability of Sirius XM for conduct of lessees over which it will have little or no control.

Advertising

- At least one commenter has indicated that the success of lessees may depend, at least in part, on advertising revenue. We find it reasonable for lessees to include advertising on their channels as a means of support for their programming. As a result, we conclude that it would be inappropriate for Sirius XM to prevent lessees from airing a reasonable amount of advertising on the leased channels.

Enforcement

- We adopt enforcement procedures that we conclude are appropriate for SDARS and specifically for compliance with this condition. A few commenters suggest that the Commission include enforcement mechanisms for the implementation of the Leasing Condition. In particular, AIR proposes that alternative dispute resolution procedures be used to resolve conflicts that arise in the implementation of the Leasing Condition.

However, I am concern with the net that is now in place to grab a wider group of entities or persons wanting to be considered for the 12 commercial channels that are now suppose to be race-neutral. History has show that without clear distinctness of terms in place the underserved is seldom served. By back peddling the FCC continues to maintain the status quo when it comes to the underserved, minorities and women. Though I understand your side stepping your fiduciary duties because of potential legal concerns as assumed in *Adarand Constructors, Inc. v. Peña*⁴, *City of Richmond v. Croson Co.*,⁵ and other cases but the **voluntary commitments** proposed by (the then applicants) Sirius and XM are not effect by either of the court ruling unless I missed a memo that Sirius XM a publicly traded company became a branch of the federal, state and or any local government. At first thought I was going to write an opinion on each section of the order but I think iClick2Media’s focus will be the issues that it believes are quintessential. Be

⁴ 515 U.S. 200 (1995)

⁵ 488 U.S. 469 (1989)

advised iClick2Media, AIR and or its parent company Independent Creative Artists reserve the right to revisit any other concerns as it relates to this order or to the issue of the 24 channels made available via the **voluntary commitments**.

One of the key components that is stated in the Memorandum Opinion and Order and Report and Order Section IV Potential Public Interest Harms Section C - Other Potential Public Harms⁶ states:

In this section we examine the impact of the merger on the Commission's goals of diversity and localism. We find that Applicants' voluntary commitments address concerns about the potential loss of diversity, we find that the merger is not likely to frustrate the Commission's localism goal.

Further in the same documents Section VI: Balancing Public Interest Harms and Benefits⁷ Clause A. General Introduction and Summary states:

As previously noted, under the Communication Act, we must determine whether the "public interest, convenience and necessity will be served" by granting the Application⁸. We now employ a balancing process, weighing the potential harm of the propose transaction that we have found against the potential public interest benefits⁹. Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest¹⁰. **Absents Applicants' voluntary commitments and other conditions**, the harms outweigh the potential benefits; the presents of these **voluntary commitments** mitigates the harm and ensures that benefits are realized. The Application and the record before us make clear that, on balance, the public interest will be served by approval of the application subject to the **voluntary commitments and other conditions** that we will discuss below. Accordingly, we accept the Applicant's **voluntary offer of these commitments** with the expectation that Applicants will adhere to each according to its specified terms and within the specified timeframes¹¹. **These voluntary commitments are fully enforceable by the Commission**¹².

In iClick2Media's opinion the reasoning for accepting said responsibility were to hold Sirius XM's feet to the fire; to avoid them from not adhering or selectively forgetting the **voluntary commitments** they made prior to merger being finalized. The FCC acceptance the **voluntary commitments** and claimed they are fully enforceable by the Commission¹³ to then redefining the term "Qualified Entities"¹⁴ and labeling it as a reasonable solution that only took two (2) years, two (2) months and nineteen (19) days after the approval of said merger smells rotten. But this is not the first time that the FCC has let the underserved, minorities and women down. In "The Scope of Competition in Telecommunications,"¹⁵ states:

⁶ FCC 08-178 ¶ 69

⁷ *In the matter of Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee* Memorandum Opinion and Order and Report and Order MB Docket no. 07-57 FCC 08-178 ¶ 104

⁸ See 47 U.S.C. §§ 309(a), (d); 310(d)

⁹ See *SBC-AT&T Order*, 20 FCC Red at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Red at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC at 13976-77 ¶ 20; *News Corp-Hughes Order*, 19 FCC Red at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Red at 23225 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Red at 20574 ¶ 25. See Section VII. A., *infra*, for discussion of the applicable language in the Commission's 1997 *SDARS Services Rules Order*, prohibiting the transfer of control of one SDARS licensee to the SDARS licensee. As discussed below, the Commission finds that the prohibition set forth o paragraph 170 of the 1997 *SDARS Service Rules Order* is a binding substantive rule, and that it is in the public interest to repeal the rule prohibiting the merger.

¹⁰ See *SBC-AT&T Order*, 20 FCC Red at 18300 ¶ 16; *Verizon-MCI Order*, 20 FCC Red at 18443 ¶ 16; *Sprint-Nextel Order*, 20 FCC at 13976-77 ¶ 20; *News Corp-Hughes Order*, 19 FCC Red at 483 ¶ 15; *Comcast-AT&T Order*, 17 FCC Red at 23225 ¶ 26; *EchoStar-DIRECTV HDO*, 17 FCC Red at 20574 ¶ 25

¹¹ Clear Channel suggests that Applicants' voluntary commitments are not enforceable. Letter for Lawrence R. Sidman, Paul Hastings, Counsel for Clear Channel, to Marlene H. Dortch, Secretary, FCC (June 20, 2008) at 2. We disagree. As we state here in, grant the Application in conditioned on the merged entity's fulfillment of Applicants' voluntary commitments and other conditioned. Therefore, the merged entity's compliance with voluntary commitments is and enforceable condition.

¹² FCC 08-178 pg 46 ¶104

¹³ FCC 08-178

¹⁴ A "Qualified Entity" includes any entity that is majority-owned by persons who are African-American, not Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics FCC 08-178 ¶ 134

¹⁵ *AEI Studies in Telecommunications Regulation* by Bernheim, B. Douglas and Robert D. Willig

The overall goal of telecommunications policy is to maximize efficiency through competition. The logic of competition and antitrust law in the United States is to guard against restrictions and impediments to competition that are not likely to be naturally corrected by competitive forces. As an alternative to antitrust and competition law, economic regulation has been established in three exceptional cases: (i) for those markets where it is clear that competition cannot be achieved by market forces; (ii) where deviation from efficiency is deemed socially desirable; and (iii) where the social and private benefits are clearly different.

In each of these cases, it is clear that a market without intervention will not result in the desired outcome. In the first case, this is true by the definition of the category. In the second case, markets may lead to efficiency, but society prefers a different outcome, and intervention is necessary to achieve the diversity goals (**voluntary commitments**)¹⁶. In the third case, maximization of social surplus does not coincide with maximization of the sum of profits and consumers' surplus because of "externalities, which is why the **voluntary commitments**"¹⁷ were added to ensure profits would not override the necessity of having the underserved, minorities and women's voices on satellite radio.

In reading the Memorandum Opinion and Order¹⁸ your new concept of race-neutral feel more like the EEO Rule 47, C.F.R. 73.2080¹⁹. The rule does not require that any person be hired or accorded a hiring preference based on racial or ethnic status. Rather, it requires that licensees make efforts to recruit minority and women applications so that they will be ensured access to the hiring process which is fundamentally different from a race-based preference program such as that at issue in *Adarand*²⁰. However, the issue still remains: Sirius XM is NOT a governmental agency, does not have the ability to implement any governmental agency race-based programs and cannot be held to *Adarand*²¹ standards. Mere outreach and recruitment efforts... typically would not be subject to *Adarand*²² standards. Indeed, post-Croson²³ cases indicate that such efforts are considered race-neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach and recruitment campaigns involves race-conscious action. But the objective when the merger between Sirius and XM was approved was not to expand the pool of applications or bidders but to include them so their voices would not be absent on satellite radio. The definition of Qualified Entity²⁴ was included to avoid the potential lockout of these Qualified Entities from this new (non-governmental) company. What a way to cool off the hot potato on everyone's mind.

In a statement made by Chairman Kevin J. Martin regarding the "**Voluntary Commitments**"²⁵ made by Sirius and XM states:

"I said at the time that the two companies announced their intent to merge that I thought they had a high hurdle to meet if they wanted to prove that the transaction would be in the public interest. It has taken some time, but I do believe that with the essential "**Voluntary Commitments**" they have made, the parties have met this burden.... I commend the parties for committing to offer more choice and flexibility in how they purchase channels.... I am pleased that the parties have

¹⁶ *Id.*

¹⁷ *In the matter of Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee* Memorandum Opinion and Order and Report and Order MB Docket no. 07-57 FCC 08-178 ¶ 134

¹⁸ *In the matter of Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee* Memorandum Opinion and Order and Report and Order MB Docket no. 07-57 FCC 10-184

¹⁹ Title 47 C.F.R. 73.2080 Equal Employment Opportunities Code of Federal Regulations

²⁰ 115 S.Ct 2097

²¹ *Id.*

²² *Id.*

²³ *City of Richmond v. Croson Co.*, 488 U.S. 469

²⁴ FCC 08-178 ¶ 134

²⁵ *In the matter of Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee* Memorandum Opinion and Order and Report and Order MB Docket no. 07-57 FCC 08-178 pg 95

committed to offering consumers, for the first time, with a specific percentage of diverse programming. The companies have agreed to dedicate eight percent of their channels – 24 channels in total—to minority and public access programming. This will create greater opportunities for more voices to be heard on satellite radio, **covering the issues that are important to those communities that may have traditionally been ignored in the past**²⁶.

Are those issues important to Sirius XM? I think not because if they were important there would have been no need to offer the **voluntary commitments**. It seems the offer was nothing more than appeasing the voices that were crying foul prior to the merger²⁷.

Further iClick2Media believes that the concern express in the Dissenting Statement of Commissioner Jonathan S. Adelstein²⁸ now raises the red flags he spoke of. According to his dissent Commissioner Adelstine wrote:

Sirius and XM (collectively the “Applicants”) currently offer dynamic and competitive audio programming to consumers. Their marketplace competition with each other has undoubtedly contributed to their cutting edge appeal... The Applicants’ commitment to set aside four percent of full-time audio channels for noncommercial educational and informational programming as well as four percent for qualified entity programming is a small step in the right direction. There is no explanation, however, as to why these commitments are significant enough to offset the potential public interest harms by a merger to monopoly... and, it is left entirely unclear how the qualified entities will be selected, leaving the entire provision unintelligible and unpredictable. “We will determined the implementation details for use of these channels [for qualified entities] at a latter date,²⁹ is a clear indication of the Commission’s historic pattern of neglecting minority access to communication industry. Once again, rather than taking a decisive step forward to improve the plight of women and people of color in media, the Commission has taken a step to the side”.

If the “high hurdle” was met by the **Voluntary Commitments** mentioned by Chairman Kevin J. Martin and the belief by Commissioner Adelstein that “a clear indication of the Commission’s historic pattern of neglecting minority access to communication industry” was true on July 25, 2008 how can the FCC now decide these points are trivial and place such faith in Sirius XM that they will do the right thing in 2010? Had not Sirius and XM developed the **Voluntary Commitments** would the merger between the two companies happened? From the language³⁰ maybe not but to walk a way from one of the key components within the **Voluntary Commitments** bring to fruition the fears mentioned in the Merger Order³¹

How about the statement made by Commissioner Deborah Taylor-Tate³² where she states:

The forfeitures imposed against these companies, in combination with strict **compliance plan** they will submit to, convince me that it is now reasonable to consider and approve the merger application. With the sluggish economic outlook and the Down Jones Industrial Average closing down almost 100 points in mid-July, compounding this environment with a negative regulatory decision could greatly harm both companies and, more importantly, their subscribers. While the FCC is only a tiny piece of the economic puzzle, I believe it is our responsibility to contribute to a vibrant healthy marketplace within those sectors under our purview.

²⁶ Statement of Chairman Kevin J. Martin Re: *Application 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 FCC 08-178* pg 95

²⁷ FCC 08-178 pg 15 ¶28

²⁸ Statement of Commissioner Jonathan S. Adelstein Re: *Application 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*

²⁹ *In the matter of Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee* Memorandum Opinion and Order and Report and Order MB Docket no 07-57 FCC

³⁰ FCC 08-178 pg 35-99

³¹ FCC 08-178

³² *Application 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* pg 104

In this statement the Commissioner realized that Sirius XM bottom line is important to survive as she states “a negative regulatory decision could greatly harm both companies and, more importantly, their subscribers” shows the FCC had a concern regarding the economic viability of the two company and saw if Sirius and XM were to survive in the “sluggish economic” they had to merge. If merging of the two was to remove the anxiety of the then economy its not that big of a step to show Sirius XM will do what is best for their shareholders and company bottom line as a oppose to doing what best for the underserved, minorities and women.

She goes on and states:

The Applicants have the burden of providing the propose transaction on balance, serves the public interest by a preponderance of the evidence. While my reaming concerns are many, I find that the Applicants have shown that this merger, with the voluntary conditions and concessions, and the previously agreed upon consent decree for their **violations** on balance will serve the public interest...The parties before the Commission today have knowingly violated a number of Commission rules and guidelines. For this reason, I felt it was necessary to resolve the issue through enforcement action first, and then proceed to consider the merger application. XM has agreed to pay \$17,394,375 and Sirius has agreed to pay \$2,200,000 million for violating modulator and terrestrial repeater rules. In addition both companies have entered into consent decrees that mandate strict compliance with certifications, reporting requirements, and penalties associated with future violations. Specifically, they have agreed to hire compliance officers whose primary responsibility will be to ensure compliance with the FCC.

It can be inferred that the Commissioner had concern regarding the past violation and saw if the two companies were merged would do the same thing if the fines had not been placed on them and the compliance officers put in place. This show the apprehension she felt about the potential of taking advantage of the system and the consumers. What about the last paragraph of Commissioner Taylor-Tate statement where she states:

Four percent of all channels on both systems must be set aside for non-commercial educational programming, and four percent must be set aside for use by “qualified entities” such as minority broadcasters. Only one programming channel per programmer will count towards the set-aside. This will promote a greater diversity of voices, and grant complete editorial control to other programmers and owners...The FCC will determine the appropriate process for selecting programmers to occupy set-aside channels. **The Applicants (Sirius & XM) will not be part of this process.**

So here’s another question for the FCC why did the FCC impose fines and demand compliance officers be put in place before the merger was complete and state Sirius XM would not be a part of the process? Here’s why, somewhere in the back of the collective brain of the FCC they saw the possibility that Sirius XM if left alone would not do the right thing. If that was the logical thinking then and all the concerns express during the process of the two companies merging prior to the **Voluntary Commitments** being presented to the FCC which assured all parties (FCC, Senate, Third parties and the Consumers) concerns were met, how can you now believe Sirius XM will hold true to the intent of what the 24 channels were set aside for? We all knew as long as big brother was choosing there could be a sense of fairness, iClick2Media doesn’t see that so much now. What iClick2Media does see is in two years two months and nineteen days the doors of diversity that had been open in this medium has now be slammed closed and there are no other opportunities for the underserved, minorities and women to go to since Sirius XM is now the only game in town.

Finally in Commissioner Taylor-Tate in her conclusion states:

In conclusion, I voted to approve this merger in light of many public interest benefits...**The FCC will oversee the compliance of these two companies**, and I personally intend to follow up with the merged entity and the FCC’s enforcement Bureau to ensure they are fulfilling the terms of the

enforcement and merger agreement...The Commission will also ensure that the spectrum is used in a way that servers the public interest by enhancing diversity and giving voice to minority and noncommercial broadcasters.

Can the FCC really believe by changing the definition of the Qualified Entity and or Entities will serve that the public interests, the underserved, minorities and women by sidestepping their responsibility? At what price? Does not the FCC have the inalienable right to maintain an equal playing field? Statically there is data that proves a huge disparages that the current state of the underserved, minorities and women with access and or ownership is dismal at best. Comments on Regulation of Access to Vertically-Integrated Natural Monopolies³³ show the main idea behind regulations was necessary because the market for telecommunication services was a natural monopoly, and therefore a second competitor would not survive. Regulations were imposed to protect consumers from monopolistic abuses. When the FCC allow this Merger to occur it only allow it to happen with the **Voluntary Commitments** in place and within those commitments it was stressed that Sirius XM would not have a voice in deciding what Qualified Entity or Entities would be granted the channels. Why was that? To ensure Sirius XM would not be tempted to ignore the conditions it had agreed on (**voluntary commitments**) the very thing that moved the obstacle of concerns out of the way and pushed the approval of the merger through.

Paragraph 3 of the Memorandum Opinion and Order:³⁴

We require Sirius XM *reasonably to exercise its good-faith judgment* to select as lessees those Qualified Entities that *it believes will advance our diversity goals*. We expect that Sirius XM will use this selection process to create opportunities for a variety of programmers, including new entrants.

The words “*reasonably to exercise*”, “*its good-faith judgment*”, “*expect*”, and “*its believes*” are a cause for alarm. There is nothing within the order that narrowly defines what “*reasonably to exercise*”, “*good faith judgment*” nor what “*it believes will advance our diversity goals*” are. Without defining what these terms in the *Order*³⁵ means you allow the **subjective thought** to be the guideline for what entities can get these channels because the judgment of the channels will be based on Sirius XM’s bottom line not what best for the underserved, minorities and women.

Paragraph 5 of the Memorandum Opinion and Order:³⁶

Several commenters in the merger proceeding voiced concerns that the merger of the sole two providers of satellite digital audio radio service would harm viewpoint and program diversity. The Commission found that the Applicants’ voluntary commitment³⁷ to provide long-term leases addressed the diversity concerns, raised by commenters and was consistent with the Commission’s goals of fostering competition and diversity.

Yes the concerns regarding programming diversity had been addressed by the **voluntary commitments**³⁸ however those concerns were eased when the FCC was to be the deciding voice not Sirius XM. By shifting (which is different from the order containing the **Voluntary Commitment**)³⁹ deciding power of what Qualified Entity or Entities will get these channels from the FCC to Sirius XM regardless of the requirement in the order⁴⁰ continue the perpetual history that Commissioner Adelstein spoke of in his dissent⁴¹ **that side step giving the appearance of an open door but continue the Commission’s historic**

³³ Comments on Regulation of Access to Vertically-Integrated Natural Monopolies Ministry of Commerce The Treasury Wellington New Zealand September 1996

³⁴ FCC 10-184 ¶ 3

³⁵ FCC 10-184 pg 2

³⁶ FCC 10-184 pg 2

³⁷ *Id*

³⁸ *Id*

³⁹ FCC 08-178 pg 62-63

⁴⁰ FCC 10-184

⁴¹ *Id*

pattern of neglecting minority access to communication industry.

HOW BOUT THIS, way back when in 1996 when then President Clinton signed the Telecommunications Act of 1996⁴² into law was the first major reform since the original 1934 Telecommunications Act. The restructuring of the US telecommunications sector crystallized changes that had become necessary because of technological progress. Rapid technological change has always been the original cause of regulatory change. The radical transformation of the regulatory environment and market conditions that was presently taking place as a result of the 1996 Act is no exception. The Telecommunication Act of 1996 was aimed to "preserve and advance universal service", this meant:

- (1) High quality at low rates.
- (2) Access to advanced services in all States.
- (3) Access in rural and high cost areas at comparable prices to other areas.
- (4) Supported by "equitable and nondiscriminatory contributions" by "all providers of telecommunications services."
- (5) Specific and predictable mechanisms to raise the required funds.
- (6) Access to advanced telecommunications services for schools, health care, and libraries.

Though the purpose of the Act had good intentions (window dressing) the effect has created a bigger gap causing a De facto censorship. In a study done entitled *Off The Dial: Female and Minority Radio Station Ownership in the United States*⁴³ shows that media consolidation is one of the key factors keeping female and minority station ownership at low levels. As consolidation cuts back the already limited number of stations available, women and people of color have fewer chances to become media owners and promote diverse programming.

Here's another something else that show the role or lack there of. In an article *Minority progress in media and why it's important written*⁴⁴ by Rick Albertson for Senator John Kerry of Massachusetts explains:

"The FCC is the agency charged with governing the media. The FCC has an obligation to promote the public interest, including diversity in media ownership. Unfortunately, the FCC has failed to adequately assess the state of minority-owned media, or develop constructive ways to encourage underrepresented entities to become larger players in the media landscape...Now we understand the FCC may soon consider changes in the media ownership rules that only help big media get bigger, but do nothing to make media more responsive to minority viewpoints and local communities...The FCC tried this once before, in 2003. At that time, the nation's top broadcasters met behind closed doors with FCC officials more than 70 times. But the public was not invited. After the proposed rules were announced, a major public backlash ensued... Providing opportunities for minority-owned businesses to own media outlets is fundamental to creating the diverse media environment that federal law requires and the country deserves and demands... any changes to the media ownership rules must encourage new entrants into the market and prioritize the entry of small, women-owned and minority-owned businesses.

In 2006 Senator Kerry urged then FCC Chairman Kevin Martin to address the issue of diversity in media ownership. In 2007-08 several other leaders in Congress — including Sen. Robert Menendez of New

⁴² Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996)

⁴³ S. Derek Turner Research Director of The Free Press

⁴⁴ *John Kerry.com Oct 26, 2007*

Jersey, Rep. Hilda L. Solis of California and Rep. John Conyers Jr. of Michigan have also pressed the FCC to stop allowing greater corporate consolidation and start promoting media diversity due to the ever shrinking voice of the underserved minority markets. Just when it looked like the FCC was doing the right thing to ensure the voices of the underserved, minorities and women be heard on satellite they pull the rug from under those of us whom have been the most active on the docket⁴⁵ and continue the perpetuation of what can be deemed segregation on the airwaves.

The FCC abdication of its responsibility to monitor and foster increased the underserved minority, and women's voices on the dial, satellite and broadcast ownership has once again fallen to the waist side. By giving these channels back to Sirius XM and trusting they will due the right thing is like allowing a fox to sleep in the chicken coop. Sirius XM will due what's best for Sirius XM's bottom line not what best for the underserved, minorities and women. So here's another question for the FCC if you now trust Sirius XM will do the right thing why did you take on the responsibility of deciding what Qualified Entity or Entities would be granted the 24 Channels 2008? According to the results of the FCC competitive analysis under "worst-case" assumptions⁴⁶:

"We conclude that the merger, absent Applicants' **"voluntary commitments"** and other conditions, would result in potential harms. However. Applicants have committed voluntary to take steps that will mitigate these harms".

At what point in the two years, two months and nineteen days did the potential harm stop becoming a potential harm? It has not. The facts are still the same; minorities, women and the underserved voices are ever-shrinking and now may not ever be heard on Satellite. The FCC continues to stick its head in the sand pretending that some Jennie on a magic carpet will ride into Washington D.C., and grant the FCC a wish and cause real diversity to be come a reality. But we all know that not going to happen and that why the decision on what Qualified Entity or Entities' would be awarded the 24 channels was in the hands of the FCC not Sirius XM.

Paragraph 10 of the Memorandum Opinion and Order⁴⁷:

However, questions have been raised regarding the constitutionality of the definition of "Qualified Entity" as adopted in the *Sirius-XM Merger Order*. To minimize the possibility of litigation regarding the constitutionality of the definition of a Qualified Entity, which could delay implementation of this important public interest benefit, we have decided to define "Qualified Entity" in this Order in a manner that is race-neutral. In particular, we define Qualified Entity to require only that a lessee: (1) not be directly or indirectly owned, in whole or in part, by Sirius XM or any affiliate of Sirius XM; (2) not share any common officers, directors, or employees with Sirius XM or any affiliate of Sirius XM; and (3) not have any existing relationships with Sirius XM for the supply of programming during the two years prior to the adoption date of this Order

So race-neutral now means everybody. Well I guess this is a case of the baby being thrown out with the bath water. What is so puzzling is the FCC doesn't see a problem with this solution even with the statics from outside sources⁴⁸, the FCC own history of diversity or lack thereof, legal proceeding that have happen since the passing of the Telecommunications Act of 1996⁴⁹ that clearly shows the underserved, minorities and women's are absence and diversity continues to reach the point of non repair.

⁴⁵ MB Docket No. 07-57

⁴⁶ FCC 08-178 pg 20

⁴⁷ FCC 10-184

⁴⁸ Off The Dial, Out of The Picture, THE INFINITE DIAL 2008: RADIO'S DIGITAL PLATFORMS, RADIO TODAY: HOW AMERICA LISTEND TO RADIO, A QUANTITATIVE HISTORY OF OWNERSHIP CONSOLIDATION IN THE RADIO INDUSTRY, Women and Minorities in the Newsroom,

⁴⁹ *Id*

Paragraph 11 of the Memorandum Opinion and Order⁵⁰:

We expect that this revised Qualified Entity definition will encourage new entry because programmers already carried on the Sirius XM platform are excluded. In addition, we believe that additional guidance will help focus Sirius XM's selection of lessees in a manner that will promote source, viewpoint, and programming diversity. We therefore provide below selection criteria and processes that, coupled with the modified definition of "Qualified Entity," are intended to advance these objectives.

So you remove Radio One, Entravision or any other party that has any association with Sirius XM ability to gain access to these 12 channels but you open all the windows and doors and allow any one that fits the race-neutral definition to apply. Once again the FCC continues the status quo, its systematic behavior of ignoring its responsibility and allow the continue pushing of the underserved, minorities and women *Off The Dial, Out of The Picture*⁵¹ and soon off of satellite and out of the digital space.

Paragraph 12 of the Memorandum Opinion and Order⁵²:

The *Public Notice* sought comment on the process for selecting lessees if channel demand were to exceed supply. Based on the record developed in response to the *Public Notice*, we conclude that allowing Sirius XM to select the lessees, subject to the limitations and criteria described herein, would best serve the public interest because it is an efficient way to select qualified lessees, ensures that the lessees selected will be technically compatible with the Sirius XM service, and will promote an increase in source, viewpoint, and programming diversity on the SDARS platform as soon as possible. We find that alternative selection proposals proposed in response to the *Public Notice* could cause unnecessary delay and uncertainty in implementing the voluntary commitment, which could thwart the Commission's goals of fostering diversity on the SDARS platform.

By not being the decider, the FCC continues to ignore its duties and insure the underserved, minorities and women will not have a voice under the Sirius XM brand. By pass the responsible back to Sirius XM continue to thwart the FCC goals for foresting diversity because without your influence into the decision you allow the forces like stock prices, investors, and what is best for Sirius XM bottom line to be the voice for choosing, not what's best for the underserved, minorities and women. Though paragraph 23 of the Order⁵³ states:

In order to ensure that any lessee selected by Sirius XM satisfies the criteria set forth in the definition of a Qualified Entity above, we require Sirius XM to notify the Media Bureau of its selections prior to signing an agreement for the leased channel or channels.⁵⁴ This process will provide the Commission with an opportunity to review each proposed lessee for compliance with the definition of a Qualified Entity before Sirius XM engages in the negotiations for a long-term lease or agreement, and it does not impose a significant burden or delay in the implementation of the Leasing Condition. Sirius XM must provide the name of each lessee it has selected and certify that, to the best of its information and belief, the entity meets the definition of a Qualified Entity as provided herein.⁵⁵ The Media Bureau will have 45 days to respond to the selection of proposed lessees submitted by Sirius XM for our review. If the Bureau does not respond within 45 days, Sirius XM's proposed lessee will be deemed to be in compliance with the definition of a Qualified Entity in accordance with this Order. Thereafter, Sirius XM may sign an agreement for the leased channel or channels. We do not intend to second-guess Sirius XM's good faith selection of one lessee over another applicant where we agree that the selected lessee meets the definition of a Qualified Entity and Sirius XM followed the transparent selection process and capacity allocation requirements set forth in this Order.

⁵⁰ FCC 10-184

⁵¹ Id

⁵² FCC 10-184

⁵³ FCC 10-184

⁵⁴ In this Order, we delegate authority to the Media Bureau staff to review Sirius XM's selection of lessees.

⁵⁵ See *supra* ¶ 10.

However, nothing in this paragraph from the Order⁵⁶ claims, states or give the FCC final say over the choices Sirius XM has made. What's even worst is if the FCC does nothing within 45 days it is deemed the choice Sirius XM has made is in compliance with the definition of a Qualified Entity. What kind of craziness is that. So there subjective meaning to these words you choose (*reasonably to exercise*", "*its good-faith judgment*", "*expect*", and "*its believes*) in choosing a Qualified Entity or Entities out weights the responsibility of the FCC? If that is true then the underserved, minorities and women have bigger problem than trying to acquire these channels because if this is the road the FCC is taking us down their wont be any advancement of any diversity goals.

Paragraph 13 of the Memorandum Opinion and Order:

Sirius XM Involvement: Although the *Sirius-XM Merger Order* indicated that Sirius XM would not be involved in the selection of the Qualified Entities, we believe this decision could hinder the implementation of this Leasing Condition for the reasons explained below. We sought comment on this issue in the *Public Notice*. The record compiled in response to the *Public Notice* strongly supports allowing Sirius XM to participate in the process of selecting lessees.

Though AIR in its comment expressed Sirius XM should be a part of the decision it has never suggest it be the sole decider. AIR understands the important of keeping its format consistence with its current format Sirius XM uses and must be able to adhere to those constrains. However AIR believes the greatest benefit in assuring the underserved is reached is with the use of digital transmission along with satellite. Sirius XM agrees with this concept because since the two companies merged, Sirius XM is now offering it services via mobile devices (i.e. iPhone and Blackberry with Sirius XM Apps). Which by the most current statistical data prove the digital divide is closing.⁵⁷

Paragraph 15 of the Memorandum Opinion and Order:

Our decision to allow Sirius XM to select among Qualified Entities is consistent with decisions regarding the selection of programmers for the Direct Broadcast Satellite ("DBS") noncommercial educational or informational programming ("NCE") set-aside and the NCE set-aside condition adopted in this proceeding⁵⁸. In the DBS context, the Commission permits the DBS operator to select the programmers who use the NCE set-aside. The Commission utilized the same approach in implementing the SDARS NCE set-aside condition in this proceeding.⁵⁹We have received no complaints regarding Sirius XM's selection of programmers for the NCE set-aside and trust that Sirius XM will exercise good faith in selecting the lessees consistent with our guidance herein.

This is nothing more than red herring. Though there has been no complaints regarding Sirius XM's selection of programmers for NCE does not exclude that fact there wont be favoritism or the selection of Qualified Entities based on how the Qualified Entities will help increase Sirius XM bottom line which is not what the intention of the 24 channels were when it was added to the then potential merge order⁶⁰. In fact the FCC might as well told Sirius XM we too care about your bottom line so we will allow you to do whatever you want as long as you stay between the lines (Oh the lines are as far apart as Los Angeles and Washington D.C., *See Paragraph 18 of the Order*⁶¹) that was not the intent when the decision was made to accept the application and approve the merger between the two. There is more at stake with the 12 commercial channels then there is with the 12 non-commercial channels. The 12 non-commercial channels are not moneymakers; they carry no weight and for many have very little value outside of educational use. However iClick2Media see's the value in creating a block of 24 channels and achieving its goal of race-neutral programming that has been presented to the FCC throughout this process and again in August of

⁵⁶ FCC 10-184

⁵⁷ Pew Internet & American Life Project: Home Broadband Adoption 2009 by John Horrigan Associate Director, Research

⁵⁸ *Sirius -XM Merger Order*, 23 FCC Red at 12415, ¶ 145; *DBS PI Order*, 13 FCC Red 23301-02. ¶ 105.

⁵⁹ *Sirius -XM Merger Order*, 23 FCC Red at 12414, ¶ 143

⁶⁰ FCC 08-178

⁶¹ FCC 10-184

this 2010⁶². It's silly to think just because someone has not done something doesn't mean if give the opportunity they wont do it and it's clear from the merge order there were many concerns about this.

The Wrap-Up

The concept of race-neutral, gender-neutral when applied, assurance against actual discrimination. This is the type of Affirmative Action contemplated by President Lyndon Johnson's Executive Order 11246⁶³, in which he sought to ensure that individuals have equal opportunity without regard to their race, sex, or ethnicity. In this 1965 Executive Order, President Johnson consistently and repeatedly used the term Non-discrimination and never once mentioned racial quotas or preferences. The original, un-amended version of the Civil Rights Act of 1964 similarly emphasize:

Race-neutrality and non-discrimination, racial-preferences and gender-preferences for the correct races and genders. Under this definition, Affirmative Action is comprised of programs and policies that grant favorable treatment on the basis of race or gender to government-defined “disadvantage” individual. Under the definition, racial or gender preference must be granted even when the favored/aggrieved minority or gender has no actual evidence or proof that a company, boss, individual, or government agency has discriminated against them due to their race or gender.

The line between racial preference and race-neutral is finding the less restrictive mean of achieving equality. It does not mean walking away form your responsibility a responsibility the FCC obligated itself to oversee and has a duty to ensure fairness over such communication. By doing this you prove what the Third Circuit chastised the FCC for in *Prometheus v. FCC*⁶⁴ ignoring the issues of the underserved, minority and women ownership.

It was important for iClick2Media to offer its opinion on this. Sometime you have to take a stand and when you draw you line in the sand you have to be prepared for what comes with taking that stand. iClick2Media might not be consider for these channels after its post this opinion but it does not make it right to the underserved, minorities and women to be treated like Oliver asking for a second helping either. Our voices need to be heard and our opinions count. Less we forget we too are part of the American fabric and with each strand of the fabric our stories, experiences, opinions, are just as important as Rush Limbaugh, Howard Stern, Sarah Palin, Al Franken Janeane Garofalo Sean Hannity and Alan Colmes. Thought the Order is final I know this is Opinion will fall on deaf ears and maybe seen as a waste of time but it only take one voice to make a difference and iClick2Media want to be that voice.

Regards,

/s/ Malik Shakur

Malik Shakur

iClick2Media

An Independent Creative Artists Company

cc:

Senator Jay Rockefeller, Senator Dan Inouye, Senator John Kerry, Senator Byron Dorgan, Senator Barbara Boxer, Senator Bill Nelson, Senator Maria Cantwell, Senator Frank R. Lauternberg, Senator Mark Pryor Senator Claire McCaskill, Senator Amy Klobuchar, Senator Tom Udall, Senator Mark R. Warner, Senator Mark Begich, Senator Kay Bailey Huchison, Senator Olympia J Snowe, Senator John Ensign Senator Jim DeMint, Senator John Thune, Senator Roger Wicker, Senator George S. LeMieux, Senator Johnny Isakson, Senator David Vitter, Senator Sam Brownback, Senator Mike Johanns

⁶² White Paper On Fcc, Sirius Xm And Adarand: How iClick2media's American Independent Radio Solves The Proble

⁶³ President Lyndon Johnson Executive Order 11234 September 28, 1965 F.R. 12319

⁶⁴ 373 F.3d 372 (2004)

APPENDICES DIRECTORY

IAB STATS DECK Social Media May 2010

HOME BROADBAND ADOPTION 2009 Broadband adoption increase, but monthly prices do too. June 2009 Pew Internet & American Life Project

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