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The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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Federal Communications Commission
Bureau / Office

Re: **Written Ex Parte Communication**
MB Docket No. 07-57

Dear Mr. Chairman:

On October 27, 2008 we wrote to you on behalf of our client, RSS Network Corp. ("RSS" or the "Company"), to express for the record the Company's interest in establishing innovative and original Spanish-language audio programming using the combined Sirius XM distribution platforms to reach the fastest growing audio market in the United States – Hispanics.

On August 5, 2008, the Commission released its Memorandum Opinion and Order and Report and Order (adopted July 25, 2008) in the above-referenced docket granting the application of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. to transfer control of the companies. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holding Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, FCC 08-178 (August 5, 2008) ("*Sirius/XM Order*"). The merger between Sirius and XM was consummated on July 28, 2008, and the combined company is now known as Sirius XM Radio, Inc. ("*Sirius XM*").

The Commission adopted as conditions of the grant several voluntary commitments made by the companies during the application process, including one that Sirius XM make available to "Qualified Entities" four percent of its full-time audio channels on each of its two satellite systems. *Sirius/XM Order*, FCC 08-178, slip op. at 62-62 (¶¶134-135), 81 (¶180), and 87-88 (Appendix B). Under this condition, at least six channels on each satellite system were to be made available to Qualified Entities for long-term lease or other agreements beginning no later than four months after the merger was consummated. *Id.* at 87. A Qualified Entity is "any 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 87 n.2. As a 100 percent Hispanic-owned company, RSS is clearly a Qualified Entity.



To date, the Commission has not established the “implementation details” that Sirius XM (or its proxy) are to use in determining which Qualified Entities are to be given access to these channels. Last week, by a *sua sponte* Order from the Media Bureau, the Commission extended the deadline in the *Sirius/XM Order* that commits Sirius XM to enter into lease agreements with Qualified Entities to February 27, 2008. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holding Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, Order, DA 08-2620, slip op. at 2 (Media Bur., released November 28, 2008).

RSS believes it is important for the Commission to ensure that the new deadline it has established for the execution of Qualified Entity leases of 12 Sirius XM channels is met. In these challenging economic times, where the multiple negative impacts of the recession on jobs, housing, and credit hit minority communities disproportionately hard, it is essential to bring to these communities a new set of voices with tailored information and entertainment programming as soon as is worldly possible. The public interest is best served if Qualified Entities meet criteria that reflect Commission goals and policies that foster innovation and competition in the audio services market and provide subscribers with programming that is not now readily available.

RSS maintains that the Commission can and should take steps to implement the Qualified Entity commitment very quickly. In an effort to assist the Commission in the development of implementation details, RSS urges the Commission to adopt the following proposed criteria for Sirius XM or its proxy to use in selecting lessees from among Qualified Entities:

- **Qualified Entities must be able to demonstrate they will provide original programming.**

This is an important element of the Qualified Entity program. A fundamental purpose for setting aside channels for Qualified Entities is to provide an opportunity for minority groups to have access to airwaves that are not otherwise available to them. The objective needs to be to establish new voices with new things to say. Diversity – including diversity in viewpoints, outlets, programs, sources, and minority ownership – has long been a cornerstone of Commission media policy. *See, e.g., 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13627 (2003). It is not enough, and would disserve the interests of minority populations, if the Sirius and XM channels reserved for Qualified Entities were used simply to repeat or “rebroadcast” programming that is already available, whether via other means of delivery, whether terrestrial, cable, or even satellite.

- **Qualified Entities must be able to deliver programming 24 hours a day, seven days a week.**

Priority must be given to entities that will serve their intended audiences at all times, not just during parts of the day. The Qualified Entity channels are not the satellite radio equivalent of local cable access channels, but are to serve as the voice of segments of the population that are unrepresented and underrepresented in terrestrial



media. Any arrangement whereby channels are leased on a time-sharing basis will dilute the voices and their impact, disserve both the minority communities, and marginalize the value of the spectrum resource that is being made available under the Qualified Entity program.

- **Qualified Entities must commit to commence programming within 90 days after the lease is awarded.**

The public interest rationale behind the Qualified Entity program and the commitments it entails demands that lessees commence programming no later than 90 days after entering into a lease agreement. If programming does not start on time, the lease would be voided and the channel(s) would be reassigned to another Qualified Entity. It would serve neither the interest of the listening public nor principles of efficient spectrum use to allow any entity that is selected to warehouse Sirius and/or XM channels without putting them to their intended use. Sirius XM would also suffer unnecessarily if channels on its system lie fallow for extended periods. It is thus critical that lessees commit to commence full time operation (24/7) within a specified timeframe. Because new programmers may not immediately have a full complement of programming available on day one, the Commission should allow for a phased-in approach, but must specify a date certain by which the programmer must offer its full complement of programming.

- **Leased channels must be assigned on the basis of the size of each Qualified Entity's minority group.**

Representatives of various Qualified Entities (as defined by the Commission) may seek to lease channels. If there are more Qualified Entities seeking access than there are available channels on Sirius and XM platforms, Sirius XM or its proxy must assign channels on the basis of the size of each Qualified Entity's minority group. The most recent population figures (*see* <http://quickfacts.census.gov/qfd/states/00000.html>) show that Hispanics comprise 15 percent of the general population, African Americans comprise 13 percent of the general population, Asians comprise 4 percent of the general population, and American Indians and Alaskan Natives comprise 1 percent of the general population. The total minority population is thus 33 percent of the nation's population. Under this proposed RSS criterion, because Hispanics comprise 45 percent of the minority population of the country, Hispanic Qualified Entities are entitled to lease 45 percent of the twelve designated channels – or five or six channels. Similarly, four or five channels are to be leased to African Americans, one channel is to be leased to Asians, and one channel is to be leased to American Indians and/or Alaskan Natives. If representatives of entities owned by one or more of these groups do not seek leases by the deadline set by the Commission for expressions of interest, then the available channels are to be divided ratably among representatives of the groups that do timely express interest.



- **Qualified Entities must be minority-owned and controlled (from a corporate perspective) and the controlling minority owners must be in full editorial control of programming material.**

It is not enough, from a Commission policy perspective, for a Qualified Entity to be majority-owned by a minority group. Priority access to leases must be given to Qualified Entities with the greatest percentage of minority ownership who will maintain active and full managerial and editorial control of the programming material. As is the case in other Commission actions where special consideration is granted to representatives of minority groups, it would undermine this effort if the entity were not actually operated by the group that has been awarded this status. Moreover, if more than one Qualified Entity is otherwise qualified for consideration, the Commission must give greater weight to groups with the greatest minority ownership participation and control.

RSS believes these are straightforward and meaningful criteria that, once adopted by the Commission and implemented by Sirius XM or its proxy, will provide clear and simple guidelines for the selection among Qualified Entities. These proposed criteria are crafted to maximize the probability that Sirius XM will provide new channels and new voices for the country's minority populations.

RSS urges the Commission to issue a public notice before the end of 2008 that outlines these criteria and calls for expressions of interest from Qualified Entities that meet these criteria to be tendered no later than January 9, 2009. Sirius XM or its proxy would then be in a position to issue lease decisions in time for leases to be executed before the February 27, 2009 deadline.

Pursuant to Section 1.1206 of the Commission's Rules, the original and one copy of this letter are submitted for inclusion in the file of MB Docket No. 07-57. Please let us know if you have any questions.

Respectfully submitted,

Raul R. Rodriguez

Stephen D. Baruch

Counsel to RSS Network Corp.

RRR/rjc

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Robert M. McDowell
Commissioner Deborah Taylor Tate
(by hand)

Mr. Patrick Donnelly
(by U.S. mail)