

# Minority Media and Telecommunications Council

3636 16<sup>th</sup> Street N.W. Suite B-366  
Washington, D.C. 20010  
Phone: 202-332-0500 Fax: 202-332-0503  
[www.mmtconline.org](http://www.mmtconline.org)

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September 3, 2010

Marlene H. Dortch, Esq.  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Dear Ms. Dortch:

RE: Notice of Ex Parte Communication: Sirius XM Set Aside: MB Docket No. 07-57; Media Ownership Diversity, MB Docket No. 07-294

This reports on telephone calls I had this morning with (1) Commissioner Mignon Clyburn, (2) Brad Gillen, Legal Advisor to Commissioner Meredith Baker, (3) Michele Ellison, Chief of the Enforcement Bureau, and (4) Austin Schlick, General Counsel, concerning the Sirius-XM minority set-aside condition. I had heard that a circulating order would set aside, on Adarand grounds, the merger condition requiring Sirius XM to offer channels to minority owned companies. Instead, the companies would be expected to make the channels available to eligible entities, defined as any entity not now programming channels for Sirius XM. Sirius XM, rather than the Commission, would select the programmers. I responded as follows:

1. The set aside as originally approved was unconstitutional on its face under current 14<sup>th</sup> Amendment standards and therefore it had to be rejected. Perhaps this means that the Commission will perform the Adarand studies, as recommended by the FCC's Advisory Committee on Diversity, that could make it possible to constitutionally justify race conscious measures.
2. As set out in ex parte letters I filed on December 10, 2009, March 5, 2010 and March 16, 2010, the Commission should adopt an eligible entity classification for Sirius XM that could include three race neutral (but not racially dilute) classifications: HBCUs, which are based on mission, not race [this could also encompass Hispanic Serving Institutions (HSIs), Asian American Serving Institutions (AASIs) and Native American Serving Institutions (NASIs)]; multilingual programmers, a classification based on language, not race, and tribal organizations, a classification based on treaty relationships, not race. The Commission should put these options out for comment before voting on the Sirius XM matter.
3. The public had absolutely no notice that the Commission was considering a new definition of eligible entity that is even more dilute than the small business definition that is extant now. And although MMTC and others, in the Media Diversity proceeding, have

Marlene Dortch, Esq.

September 3, 2010

Page 2

sought reconsideration of the small business definition's extreme diluteness, even that definition would have been less damaging than the classification now under consideration. As contemplated here, the 99.99% of programmers not presently doing business with Sirius XM - including huge multinational corporations - would all be eligible entities. This paradigm, if adopted, would implicitly reject 16 of the 72 pending diversity proposals now before the Commission; it would create a precedent that is at odds with every other federal government procurement or small business development program, and it would afford the dozens of minority programmers hoping to take advantage of the Sirius XM opportunities no realistic hope of ever prevailing, given the size, incumbency, and immense resources of the entities with which they'd be competing for these opportunities. It would be a civil rights mistake of epic proportions.

Sincerely,

*David Honig*

David Honig

President and Executive Director