

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**PETITION FOR RECONSIDERATION OR CLARIFICATION**

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## SUMMARY

The Minority Media and Telecommunications Council (“MMTC”) respectfully petitions the Commission to reconsider in part, or clarify, the Supplemental Merger Order.<sup>1</sup> It is flawed in three respects. First, the definition of “relationship” in the Supplemental Merger Order provides little guidance for Sirius XM. The Commission failed to articulate standards as to who is excluded from eligibility, and does not address whether an entity should be disqualified even if it provided only a modest amount of programming or if it swapped programming with Sirius XM. Second, the new definition of “qualified entities” failed to take into account or rule upon MMTC’s recommendations in the record below for non-racial categories of programmers that would enhance diversity. Third, the definition of “qualified entities” is so unfocused that its applicability should be limited to the unique facts presented in this proceeding.

To cure these flaws, MMTC requests that the Commission issue a supplemental ruling to (1) establish clear standards as to what constitutes a “relationship” that precludes a programmer from participating in the diversity program; (2) act upon and grant MMTC’s requests for consideration of three non-racial categories of programmers that would contribute to diversity; and (3) confine the “qualified entities” definition to the unique facts of this proceeding by taking official notice of the “Preference for Overcoming Disadvantage” recommendation of its Advisory Committee on Diversity (“Diversity Committee”) that was released five days before the issuance of the Supplemental Merger Order.<sup>2</sup>

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<sup>1</sup> Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, Memorandum Opinion and Order, 2010 FCC LEXIS 6258, FCC 10-184 (rel. October 19, 2010) (“Supplemental Merger Order”).

<sup>2</sup> See Federal Communications Commission Advisory Committee on Diversity for Communications in the Digital Age, “Recommendations to the Federal Communications Commission: Preference for Overcoming Disadvantage,” October 14, 2010, available at <http://www.fcc.gov/DiversityFAC/meeting101410.html> (last visited November 18, 2010).

## **INTRODUCTION**

The Minority Media and Telecommunications Council (“MMTC”) (also referred to hereinafter as the “Petitioner”), pursuant to Section 1.106 of the Commission’s Rules,<sup>3</sup> respectfully petitions the Commission to reconsider or clarify the Supplemental Merger Order.

Founded in 1986, MMTC is a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation’s leading advocate for minority advancement in communications. The undersigned is a regular listener to Sirius XM programming and – like MMTC members, client organizations, and constituents – would be seriously aggrieved by the diminution of programming diversity that would follow in the wake of a decision denying the relief sought herein. Thus, MMTC is entitled to standing in this matter.<sup>4</sup> MMTC, which participated in the proceedings below, presents this petition for reconsideration because MMTC could not have anticipated that the Supplemental Merger Order would contain the three flaws discussed herein.

On July 25, 2008, the Commission approved the Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee (“Merger Order”).<sup>5</sup> The transfer of control of licenses and authorizations was subject to the Applicants’ fulfillment of several voluntary commitments. Sirius XM Radio

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<sup>3</sup> 47 C.F.R. §1.106.

<sup>4</sup> See Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

<sup>5</sup> See Applications for Consent to the Transfer of Control of Licenses from XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (2008) (“Merger Order”).

Inc. became the controlling party of XM on July 28, 2008, when the transaction was consummated.<sup>6</sup>

This Commission has since set aside, on Adarand grounds,<sup>7</sup> the condition requiring Sirius XM to offer channels specifically to minority owned companies. Instead, the new requirements in the Supplemental Merger Order provide that Sirius XM would make the channels available to “qualified entities,” defined as to require 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 the [Supplemental Merger] Order.”<sup>8</sup>

#### **THE COMMISSION SHOULD CLARIFY ITS “QUALIFIED ENTITY” DEFINITION**

The definition of “qualified entities” set forth in the Supplemental Merger Order provides little guidance to Sirius XM on increasing diversity, and thus should be clarified. In particular, the Commission should direct Sirius XM to particularly consider qualified entities that would promote diversity but that are defined non-racially.<sup>9</sup> In addition, the Commission should specifically state that the definition of qualified entity in the Supplemental Merger Order is confined to the facts of this proceeding and is non-precedential. Specifically, the Commission should take official notice of the Diversity Committee’s “Preference for Overcoming Disadvantage” proposal, which if adopted, would be a more effective standard.

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<sup>6</sup> See id.

<sup>7</sup> See Adarand Constructors v. Pena, 515 U.S. 200 (1995) (holding that racial classifications in government programs are subject to strict scrutiny).

<sup>8</sup> Supplemental Merger Order, 2010 FCC LEXIS 6258, 6263, FCC 10-184, p. 5 ¶10.

<sup>9</sup> The set aside, as originally approved, was obviously unconstitutional on its face as evaluated under current 14<sup>th</sup> Amendment case law because the Commission has not performed the Adarand studies, as recommended by the FCC’s Advisory Committee on Diversity, that might have made it possible to constitutionally justify race-conscious measures.

**A. The Commission should define the “relationships” that would disqualify a programmer.**

When it approved the Sirius XM merger, the Commission considered the new opportunities that would be available to minorities in media. Chairman Genachowski recalled this history in his statement upon the release of the Supplemental Merger Order:

[t]he Commission takes action today to foster the availability of diverse programming to satellite radio subscribers and to promote access to the satellite radio platform for independent programmers and new entrants, including small businesses, women, and minorities. This Order ensures that Sirius XM will reserve channels for programmers truly independent of Sirius XM, who will be new voices on the satellite radio platform, providing original programming of a type not already available, or service to historically underserved audiences. The Order paves the way for the prompt introduction of these new services, affording smaller, independent programmers a meaningful opportunity to obtain satellite radio distribution.<sup>10</sup>

This history evidences the Commission’s aim to help diverse new entrants, including minorities, grow in the satellite programming business. There is not a hint of any intention to punish those that have enjoyed partial success and who need assistance crossing the finish line.

However, the qualified entity definition in the Supplemental Merger Order is at odds with such an approach. It would allow Sirius XM to choose entities that will program the set-aside channels so long as the entities did not have any existing “relationships” with Sirius XM for the supply of programming during the prior two years to its adoption. This condition is vague and ambiguous because it fails to give Sirius XM adequate guidance on how to promote the condition’s original purpose – increasing diversity. Specifically, this new definition does not address whether programmers that have had non-extensive relationships with Sirius XM – e.g., have provided only modest amounts of programming, or have swapped programming with Sirius XM, should be precluded from receiving the opportunity to program a set-aside channel.

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<sup>10</sup> Statement of Chairman Julius Genachowski, Supplemental Merger Order, FCC 10-184.

The approach the Commission should take is exemplified in the Section 8(a) federal contracting program that helps existing small businesses that have begun to develop, and then “graduates” those successfully progressing in the field.<sup>11</sup> Following this approach, the Commission should assist companies that have entered satellite radio programming – as well as those new to the industry - and could benefit from an opportunity to grow.

Thus, MMTC asks that the Commission clarify its definition of “relationship” to provide guidance to Sirius XM as to what constitutes a relationship extensive enough to justify the disqualification of a potential programmer. This revised provision should state that a party will not be disqualified if it has supplied programming to Sirius XM, but: (1) the party did not supply a majority of the programming heard on the designated Sirius or XM channel; (2) the party did not have its brand associated with the designated Sirius or XM channel, or (3) the party derived nominal or no net revenue (e.g., due to a programming swap) from Sirius or XM from supplying the programming.

**B. The Commission should instruct Sirius XM to afford special consideration to companies that will promote diversity by virtue of non-racial factors such as their educational mission, language, or Native American status.**

The Commission can advance program diversity by directing Sirius XM to specifically consider diversity-promoting applicants whose qualifications are not defined by race.<sup>12</sup> In

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<sup>11</sup> See “8(a) Business Development Program,” available at <http://www.sba.gov/aboutsba/sbaprograms/8abd/index.html> (last visited November 18, 2010).

<sup>12</sup> In footnote 13 of the Supplemental Merger Order, the Commission noted that it previously received this suggestion from MMTC. However, it failed to rule on the desirability of incorporating these categories into Sirius XM’s evaluations of applicants. See Supplemental Merger Order, 2010 FCC LEXIS 6258, 6262, FCC 10-184, p. 4 ¶9 note 13. See also Letter to Marlene Dortch, Secretary, FCC, from David Honig, President and Executive Director, MMTC (Sept. 3, 2010) (“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);

particular, the Commission’s qualified entity definition for Sirius XM should include three race-neutral (but not racially dilute) classifications: Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs), Asian American Serving Institutions (AASIs), and Native American Serving Institutions (NASIs), which are based on mission, not race;<sup>13</sup> multilingual programmers, a classification based on language, not race;<sup>14</sup> and tribal entities, a classification based on treaty relationships, not race.<sup>15</sup> None of these categories of programmers

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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.”)

<sup>13</sup> The U.S Department of Education defines an Historically Black College or University as an institution of higher education in the United States “that was established prior to 1964, whose principal mission was, and is, the education of black Americans, and that is accredited by a nationally recognized accrediting agency or association determined by the Secretary [of Education] to be a reliable authority as to the quality of training offered or is, according to such an agency or association, making reasonable progress toward accreditation.” Thus, institutions that have high percentages of black student enrollment, but were founded or admitted black students after 1964 would not be considered to be an HBCU and are instead termed ‘predominately black.’” See United States Department of Education, “White House Initiative on Historically Black Colleges and Universities,” [available at](http://www.ed.gov/about/inits/list/whhbcu/edlite-index.html) <http://www.ed.gov/about/inits/list/whhbcu/edlite-index.html> (last visited Nov. 18, 2010); “Developing Hispanic-Serving Institutions Program—Title V,” [available at](http://www.ed.gov/programs/idueshsi/index.html) <http://www.ed.gov/programs/idueshsi/index.html> (last visited Nov. 18, 2010); Asian American and Native American Pacific Islander-Serving Institutions Program,” [available at](http://www.ed.gov/programs/aanapicraa/eligibility.html) <http://www.ed.gov/programs/aanapicraa/eligibility.html> (last visited Nov. 18, 2010); and “White House Initiative on Tribal Colleges and Universities,” [available at](http://www2.ed.gov/about/inits/list/whtc/edlite-index.html) <http://www2.ed.gov/about/inits/list/whtc/edlite-index.html> (last visited Nov. 18, 2010).

<sup>14</sup> See, e.g. Diversity Committee Report and Recommendation of the Subcommittee on Eligible Entities (Oct. 28, 2008), p. 9-10 note 33 (“In formulating a race-neutral program, the Commission may use data regarding race and the racial impact of its regulations without triggering suspect classifications. For example, a decision to implement a program that gives credit to applicants who operate multilingual media outlets could be informed by its racial impact, but without triggering strict scrutiny.”) (citing Vialez v. New York City Housing Authority, 783 F. Supp. 109, 122 (S.D.N.Y. 1991), Frontera v. Sindell, 522 F.2d 1215, 1219-20 (6th Cir. 1975) and Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973)), [available at](http://www.fcc.gov/DiversityFAC/adopted-recommendations/eligible-entities-report-102808.pdf) <http://www.fcc.gov/DiversityFAC/adopted-recommendations/eligible-entities-report-102808.pdf> (last visited Nov. 18, 2010).

<sup>15</sup> See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, 25 FCC Rcd 1583, 1583 ¶4 (2010) (citing Policy On Establishing A Government-To-Government Relationship With Indian Tribes, 16 FCC Rcd 4078, 4080 (2000) (discussing the



is significantly represented on Sirius XM now,<sup>16</sup> and the public interest would be well served if they were. Indeed, these categories are tailor-made for satellite radio: there is rarely sufficient audience size in a local radio market to support college, multilingual or Native American programming, but a nationwide signal would reach all persons desiring this kind of diverse programming. Satellite radio is thus an essential vehicle for serving these interests that, due to geography and demographic dispersion, cannot be well served by terrestrial radio.

C. **The Commission should state that its “qualified entity” definition will be confined to the unique facts of this proceeding.**

The Commission should rule that the “qualified entity” definition in the Supplemental Merger Order is non-precedential and will be confined to the facts of this case. Due to the definition’s extremely dilute impact, the Commission’s goal of promoting diversity would be severely set back if this definition were to become the de facto standard.

Under the Supplemental Merger Order’s definition, 99.99% of programmers, including huge multinational organizations such as Google, would qualify for the channel set-aside because they have no “relationship” with Sirius XM. Additionally, this paradigm would implicitly reject 16 of the 72 pending diversity proposals now before the Commission, which are premised on an eligible entity paradigm other than small business status, and would create a precedent that is counter to every other federal government procurement or small business development program. Thus, the Supplemental Merger Order’s definition of qualified entity would create an unfortunate precedent if it is not confined to its facts.

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government-to-government relationship between the United States and federally-recognized Native American tribes)).

<sup>16</sup> As of November 18, 2010, per information obtained from its websites, none of the aforementioned programmers (except eight French, six Spanish and two South Asian channels out of 376 channels) are found on Sirius or XM. See <http://www.sirius.com/whatsonsirius> and <http://www.xmradio.com/onxm/full-channel-listing.xmc> (last visited Nov. 18, 2010).

On October 14, 2010, after two years of research and careful deliberation, the Diversity Committee voted unanimously to submit the “Preference for Overcoming Disadvantage” (“Amendment”) proposal to the Commission.<sup>17</sup> The Amendment would expand the DE program by creating an additional race-neutral preference to individuals who have at least partly overcome a substantial disadvantage. The preference would contain no presumptions or entitlements based on a person’s membership in a demographic group. Instead, each applicant would be evaluated on a case-by-case basis, looking into the extent to which she used her individual initiative to overcome a substantial disadvantage. The substantial disadvantage could have been attendant to military service trauma, a natural disaster, to poverty or discrimination or other substantial factors. Thus, the disadvantage determinations would give all types of people an opportunity to benefit based on their individual qualifications.

The Commission should confine the Supplemental Merger Order’s definition of “qualified entity” to the facts of this proceeding by taking official notice of the Diversity Committee’s proposed Amendment to the DE rules and indicating that it intends to consider the Amendment as a potential paradigm that could supplant the eligible entity definition in the Supplemental Merger Order.

### **CONCLUSION**

The Commission should clarify the “new entrant” standard by defining the “relationships” that preclude eligibility and providing guidelines to prioritize diversity by considering mission-based, language-based, and treaty-based distinctions. The Commission should also confine the definition of “qualified entity” to the facts of this proceeding by taking official notice of the Diversity Committee’s proposed Amendment to the DE Rules as a better anticipated definition.

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<sup>17</sup> See supra n. 2.

Pursuant to 47 C.F.R. ¶1.277, the Petitioner respectfully requests oral argument.

Respectfully submitted,

/s/ David Honig

David Honig

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November 18, 2010

## VERIFICATION

I, David Honig, a resident of Washington, D.C., serve as President and Executive Director of the Minority Media and Telecommunications Council (“MMTC”). I have personal knowledge of the facts that MMTC has put forward in the preceding Petition for Reconsideration or Clarification, and I hereby declare, under penalty of perjury, that the facts contained herein are true and accurate to the best of my knowledge, information, and belief.



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November 18, 2010

**CERTIFICATE OF SERVICE**

I, David Honig, President and Executive Director of the Minority Media and Telecommunications Council, do hereby certify this 18<sup>th</sup> day of November 2010 that a copy of the foregoing “Petition for Reconsideration or Clarification” has been served by electronic mail and U.S. mail to:

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/s/ David Honig \_\_\_\_\_  
David Honig