In the Matter of Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 2012 Released: February 2, 2012

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we deny the Minority Media and Telecommunications Council’s (“MMTC”) petition for reconsideration of the Commission’s Memorandum Opinion and Order that provided implementation details regarding the obligation of Sirius Satellite Radio Inc. (“Sirius”) and XM Satellite Radio Holdings Inc. (“XM”) (collectively “Sirius XM”) to set aside channels on the Sirius and the XM satellite digital audio radio service (“SDARS”) platforms for leasing to Qualified Entities.¹ MMTC requests that the Commission broaden the definition of the term Qualified Entity to permit additional entities to qualify. We also clarify one aspect of the term Qualified Entity as it pertains to officers and directors.

2. On July 25, 2008, the Commission approved the transfer of control of licenses and authorizations held by Sirius and XM subject to several conditions, including a commitment to lease a portion of their channel capacity to Qualified Entities (the “Leasing Condition”).² Specifically, Sirius and XM committed to enter into long-term leases or other agreements to provide Qualified Entities with rights to use four percent of the full-time audio channels on the Sirius platform and four percent of the full-time audio channels on the XM platform. The Commission found that Sirius XM’s voluntary commitment 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. The Commission stated that it would determine the implementation details for the Leasing Condition at a later date.

3. On October 19, 2010, the Commission explained that the Leasing Condition is an important step in promoting access for new entrants and more diverse SDARS programming. Based on comments submitted in response to a Public Notice, the Commission detailed how the set-aside of channels under the Leasing Condition would be implemented. First, the Commission defined the term “Qualified Entity” to ensure that lessees are independent from Sirius XM and to make the criteria for selection of lessees race-neutral. As the Order stated, by adopting that definition, the Commission sought to avoid constitutional challenges and potential litigation that could delay and detract from progress in satellite radio while expeditiously promoting source, viewpoint, and programming diversity on the Sirius and XM platforms. Second, the Commission assigned Sirius XM the responsibility for making timely selections of entities that are both qualified for the set-aside and technically compatible with the SDARS platform, but prohibited editorial control over the lessee’s programming. Finally, the Commission provided instructions on the allocation of capacity, established requirements for transparency in the selection process, and offered guidance on certain contract implementation issues.

4. MMTC filed a Petition for Reconsideration or Clarification of the Leasing Condition Order. MMTC asserts that the Commission was vague and ambiguous because the definition of Qualified Entity “does not address whether programmers that have had non-extensive relationships with Sirius XM . . . should be precluded from receiving the opportunity to program a set-aside channel.” MMTC also asserts that the Commission’s definition of Qualified Entity “failed to take into account or rule upon MMTC’s recommendations for non-racial categories of programmers that it argues would enhance diversity” and requests that we include these classifications in the definition of a Qualified Entity. Finally, MMTC states that the definition of Qualified Entity would create a precedent that could

3 Id. at 12410-11, ¶ 135.

4 Id.


6 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, MB Docket No. 07-57, Public Notice, 24 FCC Rcd 2855 (MB, 2009).

7 See Leasing Condition Order, 25 FCC Rcd at 14783, ¶ 10 (defining “Qualified Entity” 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 Leasing Condition Order).

8 Id. at 14780, ¶ 2.

9 See id. at 14780, ¶ 3.

10 See id.

11 Minority Media and Telecommunications Council, Petition for Reconsideration or Clarification (filed Nov. 18, 2010) (“MMTC Petition”).

12 Id. at 4. MMTC proposes that the definition of Qualified Entity be expanded to include certain entities that have supplied programming to Sirius XM. Id. at 5.

13 Id. at 1. MMTC proposes that the definition of Qualified Entity should include “Historically Black Colleges and Universities,” “Hispanic Serving Institutions,” “Asian American Serving Institutions,” and “Native American Serving Institutions,” multilingual programmers, and tribal entities. Id. at 5-6. MMTC asserts that these classifications are not based on race but, rather, are based respectively on mission, language, and tribal relationships. Id. at 6.
extend beyond the facts of the Sirius XM merger and asks the Commission to rule that the Qualified Entity definition is non-precedential and will be confined to the facts of this proceeding.\(^\text{14}\)

5. RSS Network Corporation (“RSS”) filed an opposition to MMTC’s Petition.\(^\text{15}\) RSS states that while it has no serious objection to the request that the Commission clarify the definition with respect to pre-existing relationships or limiting the definition of Qualified Entity to the instant proceeding, it opposes MMTC’s request to afford “special consideration” to entities that MMTC claims will promote diversity by virtue of “non-racial factors such as their educational mission, language or Native American status.”\(^\text{16}\) Several other parties filed reply comments to MMTC’s Petition.\(^\text{17}\) Radio One agrees with MMTC and asserts that we should revise the definition of Qualify Entity to include programmers that have had only “nominal” relationships with Sirius XM during the last two years.\(^\text{18}\) iClick2Media asserts that we should set aside the Leasing Condition Order in favor of the original definition of Qualify Entity in the Sirius-XM Merger Order and exclude Sirius XM from involvement in the selection process.\(^\text{19}\) MMTC responds to RSS and reiterates its contention that its proposals advance diversity.\(^\text{20}\)

II. DISCUSSION

6. Reconsideration of a Commission decision is appropriate when the petitioner demonstrates that the original order contains a material error or omission.\(^\text{21}\) To the extent a petition simply repeats arguments that previously were considered and rejected in the proceeding, the Commission may deny it for the reasons already provided.\(^\text{22}\) As explained further below, we deny MMTC’s Petition. To the extent the Leasing Condition Order did not specifically or fully address each of MMTC’s arguments, we consider them here.

7. We disagree with MMTC’s assertion that the Commission’s definition of the term Qualified Entity does not address whether programmers that have had non-extensive prior relationships with Sirius XM should be precluded from receiving the opportunity to program a set-aside channel.\(^\text{23}\) In

\(^\text{14}\) Id. at 7. See also id. at 8 (Commission should confine the definition 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 Leasing Condition Order).


\(^\text{16}\) Id. at 2-3. RSS also challenges MMTC’s standing to file a petition for reconsideration, asserting that MMTC was not a party to the proceeding. RSS Opposition at 2. Since we are denying MMTC’s petition, we need not address RSS’s standing challenge.

\(^\text{17}\) In addition, in a reply comment, Patrick Sharpless asserts that the Commission should require stringent application of diversity-promoting policies only to companies with demonstrated diversity violations. He argues that we should abandon the qualified entity lessee condition altogether but, if we do not do so, we should deny MMTC’s Petition. Patrick Sharpless Reply at 4 (filed Dec. 17, 2010). Because we are denying MMTC’s Petition, we do not address Mr. Sharpless’ specific concerns.

\(^\text{18}\) See Radio One, Inc. Reply at 1 (filed Nov. 29, 2010).

\(^\text{19}\) See iClick2Media Reply at 2 (filed Dec. 19, 2010).

\(^\text{20}\) See MMTC, Reply to Opposition of RSS Network Corp. to Petition for Reconsideration (filed Dec. 13, 2010).


\(^\text{22}\) Safeview, 25 FCC Rcd at 594, ¶ 7.

\(^\text{23}\) MMTC Petition at 4.
the Leasing Condition Order, the Commission addressed the definition of Qualified Entity in detail, including a discussion of the types of relationships that would be disqualifying. The Commission explained that Qualified Entities may “not have any existing relationships with Sirius XM for the supply of programming” during the past two years. The Commission further explained that “[f]uture applicants can satisfy the definition . . . only if they do not have a prior contractual relationship with Sirius XM” during the preceding two years. The Commission concluded that the stated definition would ensure that lessees are independent from Sirius XM and encourage new entry because programmers already carried on the Sirius XM platform are excluded. MMTC’s proposed relaxation of the definition of Qualified Entity to include certain entities that have supplied programming to Sirius XM would run counter to this objective. Accordingly, MMTC has failed to demonstrate a material error or omission that merits consideration of its proposed revisions to the definition of Qualified Entity.

8. MMTC has not persuaded us that it is necessary to direct Sirius XM to afford special consideration to companies that will promote diversity by virtue of their educational mission, language, or Native American status. MMTC argues that none of these programmers are significantly represented on Sirius XM now and, in MMTC’s view, the public interest would be well served if they were. While the Commission did not adopt the specific criteria proposed by MMTC, the selection criteria clearly state that Sirius XM is expected to consider, among other things, whether a Qualified Entity would offer a diverse viewpoint or diverse entertainment content and would improve service to historically underserved audiences. Thus, even though the Commission did not adopt the specific criteria suggested by MMTC, the Commission’s criteria were entirely consistent with the intent of MMTC’s proposals.

24 See Leasing Condition Order, 25 FCC Rcd at 14783, ¶ 10 & nn.19, 20 (stating that a Qualified Entity’s officers and directors will not have had any personal or family relationships with Sirius XM or Sirius XM’s officers or directors during the two years preceding adoption of the Leasing Condition Order and that future applicants can satisfy the definition of Qualified Entity only if they have not had a prior contractual relationship with Sirius XM in the preceding two years).

25 Leasing Condition Order, 25 FCC Rcd at 14783, ¶ 10 (emphasis added).

26 See id. at 14783, ¶ 10 n.20.

27 Leasing Condition Order at 14780, 14783, ¶¶ 2, 10. Similarly, we decline to revise our definition of Qualified Entity to include, as Radio One suggests, programmers that have had only “nominal” relationships with Sirius XM, such as relationships arising from a programming barter or swap. See Radio One, Inc. Reply at 1

28 MMTC Petition at 5-6. See also supra n.13.

29 See Leasing Condition Order, 25 FCC Rcd at 14786-787, ¶ 18. The Leasing Condition Order requires Sirius XM to balance various considerations including, among other things, whether lessees (1) would provide a new source of programming and are new entrants in the mass media industry, (2) would offer a diverse viewpoint or diverse entertainment content, (3) would provide original content or programming of a type not otherwise available to Sirius XM subscribers, (4) would improve service to historically underserved audiences, and (5) would, in Sirius XM’s reasonable judgment, be able to meet its obligations and be able to deliver their proposed mix or type of programming for the duration of the lease term.

30 On April 18, 2011, the Commission announced that Sirius XM implemented the Leasing Condition. See Sirius XM Implements Merger Condition That Provides Leased Channels to Diverse Programmers (press release), Apr. 18, 2011, available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0418/DOC-305856A1.doc (“April 18, 2011 Press Release”). The Chairman praised the individual selection of lessees as “a valuable step in increasing the diversity of programming available to satellite radio listeners while promoting access for new entrants and independent satellite radio programming.” April 18, 2011 Press Release. Commissioner Clyburn noted, “groups that have been historically underserved will be able to enjoy a wider variety of creative and entertaining options on a national platform.” See Statement of Commissioner Mignon L. Clyburn on The Election of Qualified Entities for Leases By Sirius XM (press release), Apr. 18, 2011, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-305880A1.doc. The lessees and their proposed programming were described as follows: (1) Howard University (licensee of WHUR-FM and WHUT-TV), One channel each on Sirius and XM – Music and talk programming for the African American community, One channel (continued….)
we do not find that MMTC has demonstrated any material error or omission that would lead us to reconsider the prior decision.

9. In addition, the Commission has addressed MMTC’s concern that the definition of Qualified Entity would create a precedent that could extend beyond the facts of the Sirius XM merger.\(^{31}\) In the Leasing Condition Order, the Commission explained that “[t]he implementation details we adopt for the Leasing Condition are specifically tailored to the unique circumstances of the Sirius XM merger . . . ”\(^{32}\) The Leasing Condition Order adequately addresses MMTC’s concerns, and MMTC has failed to show that the Order contains any material error or omission in this regard.\(^{33}\)

10. We dismiss iClick2Media’s Reply as procedurally defective. The Commission’s rules do not provide an opportunity for parties other than the petitioner to file a reply, and replies may not address matters not raised in the opposition to which they are directed.\(^{34}\) iClick2Media failed to file a timely petition for reconsideration, and its Reply addresses supposed flaws with the Leasing Condition Order rather than matters raised in an opposition. Were we to treat the Reply as a petition for reconsideration, it would be untimely because it was not filed within thirty days after release of the Leasing Condition Order.\(^{35}\) Even assuming its Reply were properly before us, we would reject iClick2Media’s argument that we should set aside the Leasing Condition Order and allow the original definition of the term Qualified Entity adopted in the Sirius-XM Merger Order to stand.\(^{36}\) As the Commission stated in the Leasing Condition Order, we believe that the definition of Qualified Entity, coupled with the selection criteria and processes that the Commission provided, will “encourage the prompt introduction of more diverse programming and program sources” and will promote source, viewpoint, and programming diversity.\(^{37}\)

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11. Finally, we take this opportunity to offer guidance as to the meaning of the word “personal” as that term is used in the Leasing Condition Order to describe the scope of the Qualified Entity definition. In defining the term Qualified Entity, the Commission stated that “[w]e also expect that a Qualified Entity’s officers or directors will not have any personal or family relationships with Sirius XM or Sirius XM’s officers or directors during the two years prior to the adoption date of this Order.” In referring to personal relationships, the Commission did not intend to implicate mere social interactions that do not give a Qualified Entity the ability to exercise undue influence on Sirius XM. Rather, the reference to personal relationships is intended to exclude from the classification of Qualified Entity those applicants who themselves or through their officers or directors have personal relationships with Sirius XM that could result in undue influence.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309, 310(d), that this Memorandum Opinion and Order IS ADOPTED.

13. IT IS FURTHER ORDERED that, pursuant to Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by the Minority Media and Telecommunications Council is DENIED.

14. IT IS FURTHER ORDERED that the Opposition to the Petition for Reconsideration filed by RSS Network Corp., the Reply Comments filed by Radio One, Inc., Patrick Sharpless, and iClick2Media, and the Opinion filed by iClick2Media are DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary