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June 30, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: MB Docket No. 07-57, Consolidated Applications for Authority to Transfer
Control of XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.
Ex Parte Presentation

Dear Ms. Dortch:

This is to notify you that on June 27, 2008, Walter Ulloa, Chairman and Chief Executive Officer of Entravision Communications Corporation; Chester C. Davenport, Managing Director of Georgetown Partners L.L.C.; Cleveland A. Christophe, Managing Partner of TSG Capital Group; Barry A. Friedman, partner at Thompson Hine LLP and counsel to Entravision, and the undersigned met with Commissioner Jonathan Cops, Rick Chessen, and Michael Steffen. The discussion was consistent with Georgetown's filings previously submitted in this docket strongly urging that the proposed merger be denied.

The merger conditions contained in the draft order reportedly circulated by Chairman Martin, whether considered individually or as a whole, completely fail to address the competitive harm inherent in approving a single-provider monopoly in the satellite digital audio radio service ("SDARS"). The Commission should reject outright this attempt to hijack the entirety of the SDARS spectrum and enforce its longstanding rule against merger of the only two licensees in this service. The parties should not be permitted to change the rules and reap the financial windfall of a monopoly when they paid the U.S. Treasury only for a license that precluded merger with the only other SDARS competitor.

Messrs. Ulloa, Davenport and Christophe discussed their mutual cooperation and readiness to provide competitive programming and related facilities if channels suitable to support competition were to be required as a public interest benefit, but agreed that there is no interest in the token offering of just 4% of the channels in the draft order. It was explained that only about 2% of the Sirius-XM listening audience would be impacted by the 20% leasing proposal due to the concentration of XM and Sirius listeners around a relatively small number of channels, *see* http://www.radio-info.com/in3_src/images/SP07_National_Satellite_P12.pdf (viewed June 30, 2008). The proposed merger will result in a monopoly of the entire spectrum available for satellite broadcasting without any offsetting public benefit unless *before* the merger is approved it includes a fully executed lease that provides enough spectrum to offer a commercially viable alternative.

The advantages of an advertiser-supported service available to all consumers were discussed. There are an estimated 36 million satellite receivers in consumer hands today, most of which were bundled into the price of new automobiles. The number is predicted to steadily increase as more cars equipped with satellite radios are sold. However, of those estimated 36 million receivers, an estimated 18 million are “dark” because their owners do not subscribe to either XM or Sirius. We pointed out that a competitive, advertiser-supported service would draw back the subscription curtain and bring new choices to all 36 million radio owners, not to just the 18 million current subscribers, and that this number will continue to increase. This is true *a la carte*, not the limited program packages proposed by the applicants.¹

We also discussed a complaint that has been filed against Sirius in the Southern District of New York alleging racism under the Civil Rights Act of 1866 and the New York State Humans Rights Law. Sirius is alleged to have wrongfully refused to renew a carriage agreement for programming targeted to African-American religious audiences, misinformed the Plaintiff of the reasons for not renewing the contract, misinformed listeners about carriage of the programming, and charged fees to the Plaintiffs for services that were not charged any other programmer. See *World Religious Relief, Inc., D/B/A The Word Network vs. Sirius Satellite Radio, Inc.*, Case No. 05 CV 8257 (BSJ)(AJP), Plaintiff’s Memorandum of Law dated June 10, 2008 (attached). It also was noted that in the wake of widely reported offensive racial comments by Don Imus, Sirius’ CEO Mel Karmazin stated that Imus would be welcome on Sirius, see: <http://www.youtube.com/watch?v=g2mhaPFYspU> (last viewed June 30, 2008).

Finally, the string of apparent violations by the applicants was discussed. It contravenes Commission enforcement precedent to allow the merger to go forward without resolving the longstanding enforcement proceedings that are pending against Sirius and XM. It is difficult to understand why the Commission would grant a monopoly to entities accused of harboring “executive and senior-level employees” who knowingly directed others to violate multiple FCC rules. These allegations have been under investigation by the Commission’s Enforcement Bureau for more than two years.

- Personnel of one licensee reportedly directed manufacturers to provide wireless transmitters for use with SDARS products that knowingly exceeded the Commission’s power limitations and caused harmful interference to another communications service.
- Sirius and XM are alleged to have illegally constructed and placed on the air hundreds of repeaters and towers.

¹ See *Ex Parte* Comments of Georgetown Partners L.L.C. filed on January 29, 2008.

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- Both licensees failed to comply with the Commission's requirements with regard to interoperable radios, notwithstanding that the requirement itself was adopted by the Commission in 1997, made an explicit condition of their licenses, and certifications were made to the Commission concerning compliance.

For the above reasons and those stated in Georgetown's earlier filings, the Commission cannot make the requisite public interest finding without an effective remedy to the monopoly requested by Sirius and XM. The Commission must deny the merger and should do so immediately.

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this letter is being filed in the above docket.

Respectfully submitted,



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PRELIMINARY STATEMENT

Pursuant to Fed. R. Civ. P. 15, Plaintiff World Religious Relief, d/b/a The Word Network ("TWN"), by its attorneys Dickstein Shapiro LLP, respectfully submits this Memorandum of Law and the accompanying Declaration of Keith A. Markel, Esq., dated June 10, 2008 (the "Markel Decl."), in support of TWN's Motion for Leave to File an Amended Complaint (attached as Ex. D to the Markel Decl.): (1) restating its breach of contract claim against Defendant Sirius Satellite Radio Inc. ("Sirius"); and (2) reinstating its claims of racial discrimination against Sirius for failure to renew that certain Radio License Agreement by and between Sirius and TWN dated as of September 4, 2002 (the "Agreement").¹

Grant of the motion would be in accord with Rule 15(a) and cases interpreting that rule. Grant of the motion will serve the ends of justice and will not unduly prejudice Sirius.² In fact, TWN's amendment is based primarily on documents produced by Sirius and the deposition testimony provided by Sirius' former employees.³ That documentary and testimonial evidence shows (1) that TWN provided the only religious programming on the Sirius satellite which relied almost exclusively on African-Americans and which was targeted almost exclusively to satisfy the needs

¹ The Agreement is attached as Ex. A to Markel Decl.

² By letter dated May 28, 2008, Plaintiff notified Sirius' counsel of its intention to seek leave of the Court to file an amended complaint to reallege its discrimination claims. On June 2, 2008, TWN's counsel contacted Sirius counsel to seek consent for TWN's proposed amended complaint, but that consent was denied on June 3, 2008. Markel Decl. ¶¶ 17, 18.

³ Supporting evidence in the possession of TWN has already been produced to Sirius.

and interests of African-Americans, (2) that TWN paid equipment fees and marketing fees that were not charged to any other Sirius programmer, (3) that Sirius used various pretexts to explain its termination of the Agreement, but even today – almost three (3) years after the litigation was initiated – Sirius does not have a coherent explanation to truthfully explain why it terminated the Agreement, and (4) that, not having a reasonable explanation to justify the termination, Sirius falsely informed its subscribers that TWN's programming was not being removed from Sirius but had simply been moved to another channel with a new name.⁴

BACKGROUND

On September 26, 2005, TWN filed a complaint against Sirius which asserted claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and the NYSHRL § 296(13), as well as breach of contract claims based on Sirius' termination of the Agreement.

On October 31, 2005, Sirius moved to dismiss TWN's complaint. By Order dated August 3, 2007, the Court dismissed TWN's claims under Section 1981 and NYSHRL § 296 without prejudice and granted TWN leave to amend its complaint to reassert its civil rights claims within 30 days (September 3, 2007).⁵ Although the amendment deadline set forth in that Order has expired, the interests of justice require that TWN be

⁴ Various Emails from Sirius falsely informing its subscribers that TWN was not being removed from Sirius after TWN had already been removed from Sirius are attached as Ex. E to Markel Decl.

⁵ The Court's August 3, 2007 Order is attached as Ex. B to Markel Decl.

granted leave to file the amendment now. The amendment is based largely on facts learned in the course of discovery which were unknown to TWN as of September 3, 2007 and could not have been known until TWN conducted extensive discovery.

The delay in obtaining those new facts did not reflect any lack of due diligence on TWN's part. In conjunction with settlement talks, TWN granted Sirius an extension of time to answer the complaint, and the answer was not filed until October 22, 2007. On December 11, 2007, Magistrate Judge Peck issued a Scheduling Order. The parties subsequently filed a Proposed Joint Discovery Plan with the Court, which Judge Peck so ordered on January 7, 2008. The parties exchanged Initial Disclosures on January 18, 2008. Both before and after that date, the parties have engaged in settlement discussions but were unable to reach a settlement.

In the meantime, on February 8, 2008, TWN served its First Request for the Production of Documents and Interrogatories on Sirius. On March 10, 2008, TWN received Sirius' Objections and Responses to its First Request for Production of Documents and First Set of Interrogatories but no production of documents. Sirius finally produced some documents (consisting of approximately 150 pages) on April 9, 2008. Another Sirius document production followed on April 15, 2008, but the bulk of Sirius' documentary evidence was not received by TWN until April 22, 2008 when Sirius produced nine (9) boxes containing thousands of documents (including many

that were relevant to the allegations in TWN's amended complaint).⁶ In total, Sirius produced about 48,000 pages of documents. Review of those documents necessarily required considerable time.⁷

On May 22, 2008, TWN deposed Joseph LaPlante (a/k/a Jay Clark), Sirius' former Executive Vice President of Programming at the time TWN programming was carried on the Sirius satellite.⁸ Mr. LaPlante testified, *inter alia*, that he controlled the programming on Sirius' satellite at the time TWN was on the air and that he was the key decision-maker in terminating the Agreement between TWN and Sirius. Markel Decl. Ex. G at 37, 68. Mr. LaPlante further testified that:

⁶ Sirius also marked all of the documents contained in the nine (9) boxes as "Confidential Information."

⁷ TWN's speed in filing its Motion for Leave to file the Amended Complaint is all the more remarkable in light of the defects in Sirius' document production. Of the 48,499 pages of documents Sirius produced, many were produced out of sequence, without identification, and in an incomprehensible format. These incomprehensible documents included the so-called market research that Sirius claimed to use as the basis to terminate the TWN Agreement. For example, many of the market research documents were excel spreadsheets with color coding which Sirius produced in black and white on 8 1/2 x 11 paper that cut off pertinent information and rendered the spreadsheets virtually impossible to read. Despite TWN's prior request to Sirius' counsel for assistance, nothing was done to correct the deficiency until the Court issued a ruling at the May 15, 2008 discovery conference that counsel for Sirius be required to immediately produce a CD containing legible versions of the documents produced on April 22, 2008. See Markel Decl. Ex. F at pg. 6. TWN received the first version of this CD on May 16, 2008, but the latest version of this CD was only produced by Sirius on June 5, 2008.

⁸ A copy of Mr. LaPlante's deposition transcript is attached as Ex. G to Markel Decl. Mr. LaPlante was employed by Sirius from April/May 2002 until January 2007. Markel Decl. Ex. G at 31.

- the annual marketing fee that TWN was required to pay was not charged to any other programmer, Markel Decl. Ex. G at 107;⁹
- all other Sirius programmers were entitled to receive the same marketing services even though they did not pay an annual marketing fee, Markel Decl. Ex. G at 90;
- although they did not pay the same annual marketing fee charged to TWN, all programmers were included on the promotional information which Sirius distributed to the public, Markel Decl. Ex. G at 127;
- although Sirius did not have ratings information comparable to the ratings generated by Nielsen for broadcast television or by Arbitron for terrestrial radio, Mr. LaPlante referred to Sirius' general market research as "ratings" that could be used as a pretext to terminate Sirius' Agreement with TWN, Markel Decl. Ex. G at 18, 20;
- African-American subscribers never constituted more than 4% of the total sample of subscribers surveyed in Sirius' market research throughout the years that TWN was on Sirius, Markel Decl. Ex. G at 192-193; Ex. I at S041927, S041932;¹⁰
- Sirius never advised TWN of its market research or of TWN's alleged "poor ratings" until after Sirius had advised TWN of its refusal to renew the Agreement, but other programmers were not only advised of their alleged "poor ratings" but also given an opportunity to cure that alleged poor performance to avoid having their agreements terminated by Sirius, Markel Decl. Ex. G at 217; 221-23; and Ex. J at S9881 XV: Programming;¹¹
- although it advised TWN that the Agreement was being terminated due to alleged "poor ratings," Sirius purportedly terminated the Agreement with TWN due to an alleged perceived need for increased bandwidth to

⁹ This was also confirmed by Sirius' production of a spreadsheet which listed all of the contracts Sirius had with its programmers and what fees were charged to each of those programmers, including TWN. See Markel Decl. Ex. H (Misc column).

¹⁰ Indeed, only 3% of those surveyed were African-American after the second quarter of 2003, and only 2% of African-Americans were surveyed in the fourth quarter of 2004. Id.

¹¹ A copy of Sirius' June 2005 Monthly Operations Report is attached as Ex. J to Markel Decl.

accommodate other programming that Sirius was acquiring. Markel Decl. Ex. G at 14;

- although it acquired more bandwidth shortly after it advised TWN of the termination of the Agreement, Sirius never offered to restore TWN's programming to the satellite, Markel Decl. Ex. G at 142-43; and
- not having a reasonable explanation for the termination of TWN's Agreement, Sirius falsely advised inquiring subscribers that TWN had not been terminated but had simply been moved to another channel. Markel Decl. Ex. G at 235-236.

On June 5, 2008, Christine Heye, Sirius' Vice-President of Market Research from July 2002 until January 2007, provided deposition testimony that the market research on which Mr. LaPlante purportedly relied to terminate the Agreement with TWN did not constitute individual "ratings" that gauged the listenership for each Sirius programmer but was instead designed to assess overall customer satisfaction with Sirius' *entire* package of services.¹² Markel Decl. Ex. K at 111, 151, 204-205.¹³ Ms. Heye also confirmed (1) that less than 4% of the subscribers surveyed in Sirius' customer satisfaction market research were African-American (Markel Decl. at Ex. K at 139-140, 142-143, 157-158),¹⁴ and (2) that Sirius' market research could not be considered "ratings"

¹² A copy of Ms. Heye's deposition transcript is attached as Ex. K to Markel Decl.

¹³ Indeed, Ms. Heye testified that Sirius didn't even perform listenership studies until after TWN was terminated. Markel Decl. Ex. K at 26, 39, 119. Ms. Heye, however, testified that it was only done twice after TWN was terminated because Sirius did not have the resources to conduct these types of surveys. *Id.* at 120-121.

¹⁴ See also Markel Decl. Ex. L at S041932.

comparable to those produced by Nielsen for broadcast television or Arbitron for terrestrial radio. Markel Decl. Ex. K at 30, 122-123.

On June 6, 2008, TWN took the deposition of Lawrence Rebich, who served as Sirius' Vice-President of Programming and Acquisition between 2002 and 2004 and signed the Agreement on behalf of Sirius.¹⁵ Mr. Rebich testified that he did not know of any other Sirius programmer who paid an annual marketing fee.¹⁶ Like Ms. Heye, Mr. Rebich believed Sirius' market research to be more focused on "consumer adoption of satellite radio than about individual channels." Markel Decl. Ex. M at 120. Mr. Rebich further testified that he never recalled anyone, including Mr. LaPlante, stating that TWN had "poor ratings" before he left Sirius in late 2004. Markel Decl. Ex. M at 23. Indeed, Mr. Rebich confirmed that satellite radio did not have ratings like broadcast television or terrestrial radio. Markel Decl. Ex. M at 119.

ARGUMENT

I. TWN AMENDMENT WOULD SERVE THE ENDS OF JUSTICE

Federal Rule of Civil Procedure 15(a) provides that a party may amend its complaint by leave of court and that such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). As the Supreme Court explained:

[T]his mandate is to be heeded In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the

¹⁵ A copy of Mr. Rebich's deposition transcript is attached as Ex. M to Markel Decl.

¹⁶ See Markel Decl. Ex. M at 99; Ex. H. Mr. Rebich also confirmed that no other programmer paid a \$25,000 equipment fee. Markel Decl. at Ex. M at 84.

part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be “freely given.” . . . If the underlying facts or circumstances relied upon by Plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.

Foman v. Davis, 371 U.S. 178, 182. Rule 15(a) thus provides substantial leeway for a plaintiff like TWN to have credible claims of wrongdoing tested in the crucible of a trial.

The grant or denial of leave to amend falls initially within the discretion of the trial court. See Foman, 371 U.S. at 182-83. There are, to be sure, circumstances where it would not be appropriate to grant a plaintiff leave to amend its complaint. Leave to amend a complaint should be denied, for example, “where it appears that [it] is unlikely to be productive.” Banco Cent. Del Para. v. Para. Humanitarian Found., Inc., No. 01 Civ. 9649(JFK)(FM), 2003 WL 21543543, at *4 (S.D.N.Y. July 8, 2003). However, if the plaintiff has “colorable grounds for seeking relief,” the motion to amend should be granted. Id.

The First Amended Complaint amply satisfies the foregoing standards. The amended complaint could not be filed until discovery fleshed out the allegations contained in the original complaint (when TWN had no access to internal Sirius documents or the recollections of Sirius personnel). Those documents and recollections demonstrate: (1) that TWN was the only programmer to be charged a marketing fee or a \$25,000 equipment fee, (2) that, after more than three (3) years of discussing and

litigating the issue, Sirius has still failed to provide a credible explanation for why it terminated the Agreement with TWN, and (3) that, not wanting to admit to something it could not explain, Sirius falsely told inquiring subscribers that TWN's programming had been moved to another channel under a different name.

Considered together, these facts more than justify an inference of racial discrimination – bearing in mind, of course, that no miscreant would ever want to boldly acknowledge having engaged in such discrimination. Stated another way, TWN has “colorable grounds” for its amended complaint.

II. TWN HAS PROCEEDED DILIGENTLY AND IN GOOD FAITH

The Second Circuit instructs district courts to allow such amendments, even in the face of substantial delay, unless the movant has acted in bad faith, the amendment will prejudice the non-movant, or the amendment is futile. See Purdy v. Town of Greenburgh, 166 F. Supp. 2d 850, 859 (S.D.N.Y. Sept. 26, 2001) (citing Richardson Greenshields Secs., Inc. v. Lau, 825 F.2d 647, 653 n. 6 (2d Cir. 1987) (“[m]ere delay, . . . absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend”).

TWN has proceeded in good faith and without delay at every stage of this litigation. Discovery commenced in January 2008. Prior to that point, TWN had no access to needed information and was forced to support its initial allegations of racial

discrimination upon information and belief.¹⁷ That void has now been filled through discovery, and TWN seeks nothing more than to conform its pleadings with the new evidence it has uncovered.

The new allegations of racial discrimination – which basically revive the allegations in the initial complaint – will not “dramatically change the nature of the case” because the issue of racial discrimination is closely intertwined with TWN’s breach of contract claim. See Am. Med. Ass’n v. United Healthcare Corp., No. 00 Civ. 2800 (LMM), 2006 WL 3833440, at *7 (S.D.N.Y. Dec. 29, 2006) (“[t]he original allegations and the proposed claims, and the forms of relief sought....and allowing the addition of the proposed claims would not dramatically change the nature of the case against Defendants”). TWN’s complaint ultimately revolves around Sirius’ failure to treat TWN fairly. In this context, “the new claims are merely variations on the original theme . . . , arising from the same set of operative facts as the original complaint.” Hanlin v. Mitchelson, 794 F.2d 834, 841 (2d Cir. 1986).

That the evidentiary foundation for the amendments was laid during discovery is also a valid reason for the delay in filing the Amended Complaint and provides yet another basis for allowing TWN leave to file that Amended Complaint. See Am. Med. Ass’n, at *4 (granting leave to amend where “the basis for Plaintiffs’ Proposed

¹⁷ The Court dismissed the allegations of racial discrimination at the beginning of the case – before discovery had been conducted – because the Court determined that the allegations in the complaint based “upon information and belief” were insufficient to support an inference of discrimination. Markel Decl. Ex. B.

Amendments was formed, at least in part, during Stage One discovery and . . . this [is] a satisfactory explanation for the [two-and-a-half-year] delay in the filing of the Proposed Amendments"); Banco, 2003 WL 21543543, at *4 (granting leave to add amend in order to add defendants after their roles in alleged conspiracy and conversion were discovered through deposition testimony almost two years later); Xpressions Footwear Corp. v. Peters, Nos. 94 Civ. 6136 (JGK), 95 Civ. 8242 (JSM), 95 Civ. 8243 (JSM), 1995 WL 758761, at *2 (S.D.N.Y. Dec. 22, 1995) ("[F]ederal courts consistently grant motions to amend where it appears that new facts and allegations were developed during discovery, are closely related to the original claim, and are foreshadowed in earlier pleadings").

It should also be emphasized that TWN has moved expeditiously to file the Amended Complaint. Much of the information underlying the new allegations is reflected in documents that were produced in legible form approximately three weeks ago and deposition testimony that is no more than a few weeks old, and in some cases of testimony, only days old. Consequently, it cannot be said that TWN has been less than diligent in bringing these allegations to the attention of the Court.

III. SIRIUS WILL NOT SUFFER ANY UNDUE PREJUDICE

In order to determine whether the opponent would be unduly prejudiced by the amendment, Courts in this Circuit "consider whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct

discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.” Block v. First Blood Assoc., 988 F.2d 344, 350 (2d Cir. 1993). A court will generally find undue prejudice to the opponent only when the motion to amend “comes on the eve of trial after many months or years of pre-trial activity; the amendment would cause undue delay in the final disposition of the case; the amendment brings entirely new and separate claims, adds new parties or at least entails more than an alternate claim or a change in the allegations of a complaint.” Care Envtl. Corp. v. M2 Tech., Inc., No. Cv-05-1606 (CPS), 2006 WL 2265036, at *6 (S.D.N.Y. Aug. 8, 2006).

Such is not the case here. Sirius will not be prejudiced in any way by the Court’s acceptance of the amendment to the original complaint. The proposed amendment will not require the Court or the parties to expend additional time or effort in the conduct of discovery. Indeed, TWN notified Sirius of its intent to amend the complaint during the course of discovery, and both parties have had an opportunity to explore the discrimination claims during the depositions. Sirius was therefore able to take the depositions of TWN’s CEO, TWN’s President and TWN’s former Director of Marketing after TWN informed Sirius of its intent to amend the complaint. Sirius also deposed three non-party African-American ministers affiliated with TWN after it received TWN’s notice of intent to amend the complaint.

CONCLUSION

For the foregoing reasons, TWN respectfully requests that Court grant its Motion for Leave to File a First Amended Complaint.

Dated: June 10, 2008

Respectfully submitted,

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