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Federal Communications Commission
Office of the Secretary

July 24, 2008

Marlene H. Dortch, Secretary
Federal Communications Commission
Suite 110
236 Massachusetts Avenue, NE
Washington, DC 20002
Attn: Audio Division, Media Bureau

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

Dear Ms. Dortch:

Enclosed please find a copy of a letter from The Word Network to the Chairman with respect to the above-referenced proceeding. Copies of the letter were served on the individuals identified on page 4 of the letter.

Sincerely,

DICKSTEIN SHAPIRO LLP
Attorneys for The Word Network

By: 
Lewis J. Paper
Albert H. Kramer

Enclosure
cc: Parties identified on attached letter

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July 24, 2008

BY HAND

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

RE: Ex Parte Communication
Consolidated Application for Authority to Transfer Control of XM Satellite Radio
Holdings Inc. and Sirius Satellite Radio Inc.
MB Docket No. 07-57

Dear Mr. Chairman:

This letter is submitted on behalf of The Word Network (“TWN”) for the purpose of proposing language in any order approving the above-referenced application with respect to the distribution of channels to be set aside for noncommercial educational programming (the “NCE Channels”) and for minority programming (the “Minority Programming Channels”). See Letter from Robert L. Pettit to Marlene Dortch, dated June 16, 2008, attaching a letter from Richard E. Wiley and Gary M. Epstein to Kevin J. Martin, dated June 13, 2008 (the “Merger Letter”). More specifically, TWN proposes (1) that the NCE Channels be made available to any entity who can satisfy or has satisfied the eligibility requirements for Direct Broadcast Satellite (“DBS”) noncommercial programming in Section 25.701(f)(2) of the Commission’s rules, (2) that, in addition to minority-owned entities, the Minority Programming Channels be made available to any noncommercial entity that directs its programming to the needs and interests of a designated minority community, and (3) that the selection for entities to have access to the NCE Channels and the Minority Programming Channels be made in each case by a separate Board of Advisors consisting of three to five individuals who (a) have no financial or other interest in or relationship with any the merger parties (or their affiliates) or any parties seeking access to one of the channels (or with any affiliate or any individual who has an ownership or business interest in or with such parties).

TWN is a nonprofit entity that directs its programming to the needs and interests of the African American community. TWN’s programming is carried on virtually every cable system in the country. TWN also occupies one of the channels of Dish Network, a DBS carrier, reserved for noncommercial programming under Section 25.701(f)(2).

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Although its programming is suitable for video distribution, TWN's programming can also be carried by radio. To that end, TWN entered into a contract with Sirius Satellite Radio Inc. ("Sirius") in September 2002 to have TWN programming carried on the Sirius satellite. That channel was a highly useful complement to TWN's service by enabling its programming to reach African American audiences that did not have access to TWN's programming through other media outlets. Sirius decided not to renew the contract in 2005 (and TWN thereafter instituted litigation in the United States District Court for the Southern District of New York to remedy what TWN perceived as a wrongful breach of Sirius' contractual and statutory obligations). As a result, TWN's programming is no longer carried on any radio facility.

I. Distribution of NCE Channels and Minority Programming Channels

A. NCE Channels

In the Merger Letter, Sirius and XM Satellite Radio Holdings Inc. ("XM") propose that the NCE Channels be made available "for noncommercial, educational and informational programming within the meaning of 47 C.F.R. §25.701(f)(2) of the DBS set aside rules." Merger Letter at 3. Those criteria are certainly appropriate and will eliminate the need for the Commission to expend the time and resources to develop criteria that were established through a notice-and-comment rulemaking proceeding. However, to simplify and clarify implementation of those criteria in the XM-Sirius merger, the Commission should state explicitly that any party who has received one of the DBS channels under Section 25.701(f)(2) should also be eligible for acquisition of one of the NCE Channels.

Beyond that, the Commission order should include two additional provisions to identify the nonprofit entities who would be qualified to access the NCE Channels.

First, the Commission should make clear that a nonprofit entity offering noncommercial programming responding to the needs and interests of minorities qualifies as a "public telecommunications entity" under Section 25.701(f)(2)(ii) of the Commission's rules. That section references "[a] public telecommunications entity as defined in section 397(12)" of the Communications Act as a "Qualified Programmer" eligible to use channels in the DBS set aside. Section 397(12), in turn, defines a "public telecommunications entity" to include a nonprofit entity that (1) "has been organized primarily for the purpose of disseminating audio or video noncommercial education and cultural programs to the public by means other than a primary television or radio broadcast station. . .," 47 U.S.C. §397(7), and (2) disseminates "public telecommunications services," which is defined to be "noncommercial educational and cultural programming radio and television programs and related . . . informational material. . ." 47 U.S.C. §397(14). The Commission should state in its order that a nonprofit entity which produces and disseminates programming responding to the needs and interests of minorities qualifies under those criteria.

Second, the Commission should state in its order that nonprofit entities producing and disseminating noncommercial programming directed to the needs and interests of minorities qualify as "noncommercial entities with an educational mission" under Section 25.701(f)(2)(v).

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That statement would comport with the obvious intent of that section and the purpose to be served by the XM-Sirius set aside for NCE Channels.

B. Minority Programming Channels

To be sure, it is a laudable goal to increase the number of minority-owned entities who will have access to a national radio audience. However, an equally laudable goal would be to promote diversity of programming for minority audiences, and the eligibility criteria should therefore be expanded to include nonprofit entities whose programming is directed to such minority audiences. Such an expansion could be particularly useful because there appear to be very few minority-owned commercial programmers who are capable of providing radio programming on a nationwide basis.

Expanding the criteria to include nonprofit entities – which are not technically “owned” by anyone – would increase the number of eligible candidates and, at a minimum, help ensure that these channels do not lie fallow for lack of qualified candidates. This expansion would also be consistent with the Commission’s public interest goals of promoting diversity of programming for minority audiences.

II. Procedure for Allocation of Channels

The Merger Letter does not explain how the NCE Channels and the Minority Programming Channels will be distributed. As a starting point – and as the merger parties themselves apparently agree – the merged entity should not be involved in the process.

As one alternative, the Commission’s order could require the merged entity to designate an Advisory Board of three to five distinguished persons for each category of channels. The Board members could be identified in the merger order or identified by XM and Sirius prior to consummation of the merger. Each Advisory Board would make the choice of which entities qualify for each category of channels and, to the extent there are more qualified entities than channels, establish a procedure (whether by lottery or otherwise) for selecting the parties to receive the channels (and, to the extent any channels are later abandoned, the procedure for advertising the availability of channels and the process for selecting parties to have access to them). Each Advisory Board could be self-perpetuating by allowing the Advisory Board members to select the person(s) to fill any vacancies that may occur over time (bearing in mind that there will probably be little activity for the Advisory Boards over the course of time).

The Commission may also want to impose some minimal requirements to ensure that the NCE and Minority Programming Channels are allocated in a way that promotes diversity of programming and maximizes the number of programmers. To that end, the Commission order should state that entities whose programming is already carried on XM or Sirius (including any affiliates) should not be allowed to compete for the NCE or Minority Programming channels.

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Conclusion

Adoption of the proposals advanced in this letter will substantially enhance the public interest benefits if the Commission approves the XM-Sirius merger. It is therefore hoped that they can be given careful consideration.

Respectfully submitted,

DICKSTEIN SHAPIRO LLP

Attorneys for The Word Network

By: 

Lewis J. Paper
Albert H. Kramer

cc: Honorable Michael J. Copps
Honorable Jonathan S. Adelstein
Honorable Deborah Taylor Tate
Honorable Robert M. McDowell