

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
XM Satellite Radio Holdings Inc.)	MB Docket No. 07-57
<i>Transferor</i>)	
)	
and)	
)	
Sirius Satellite Radio Inc.)	
<i>Transferee</i>)	
)	
Consolidated Application for Authority to)	
Transfer Control of XM Radio Inc. and)	
Sirius Radio Inc.)	

**COMMENTS OF
RANDOLPH J. MAY
PRESIDENT
THE FREE STATE FOUNDATION***

To those *uninitiated* in FCC policy and practice, reading the Mass Media Bureau's Public Notice¹ concerning the Sirius-XM merger condition requiring Sirius to lease four percent of its channel capacity to minority-owned entities calls to mind Winston Churchill's famous epigram, the one about "a riddle, wrapped in a mystery, inside an enigma." To those *initiated* in the ways of the FCC, wayward ways in this instance, the Bureau's Public Notice might be seen as a plea for help, as in: "Help us get out of this difficult situation without tying ourselves in a constitutional knot from which we may never get extricated."

* These comments express the views of Randolph J. May, President of the Free State Foundation, an independent, non-profit free market-oriented think tank. They do not necessarily represent the views of the Board of Directors or others associated with FSF. The research assistance of FSF Research Assistant Tristan Hardy is gratefully acknowledged.

¹ Public Notice, "Media Bureau Seeks Comment on Implementation of Sirius-XM Merger Condition," MB Docket No. 07-57, February 27, 2009.

Here's the riddle for those who may be *uninitiated*: The Media Bureau says right in the first paragraph of the Public Notice that Sirius-XM made a "voluntary" commitment to set aside four percent of its capacity for minority owners.² Indeed, in just one paragraph in the order approving the merger, the Commission recited five times that the applicants' commitments, including the minority ownership commitment, were "voluntary."³ But, then, in accepting the "voluntary" minority ownership set-aside condition, the Commission stated: "We will determine the implementation details for use of these channels at a later date."⁴

In the Public Notice, the Bureau asks for public comment on a bunch of questions having to do with dictating the allocation of the capacity that is the subject of the voluntary condition, including whether Sirius XM should select or even be involved in the selection process at all, or whether, perhaps, the selection might be made by an "independent trustee."⁵ (Curiously, the Bureau does not ask how the "independent trustee" might be selected.) So back to the enigma: If the minority set-aside commitment is "voluntary," as the Commission recites over and over, why does the Commission need to be involved in dictating the implementation details?

To the *initiated*, there is not much mystery here, just an agency self-induced constitutional predicament. Commission observers know that the Sirius-XM set-aside commitment was not really "voluntary" within the ordinary meaning of the English language, say, as Churchill would have understood the word. It was offered up under a distinct form of regulatory compulsion, after "midnight" discussions with Commission

² Public Notice, para. 1.

³ XM-Sirius Radio Holdings, Inc., 23 F.C.C. Rcd 12348, 12352-353 (2008).

⁴ Id. at 12411.

⁵ Public Notice, para. 3.

personnel, in order to get the agency to act without further delay on a merger already long delayed. I have written often about the problematic, even unseemly, nature of the agency's merger review process in which merger applicants are forced to offer up "voluntary" concessions unrelated to the competitive impacts of the particular merger, and I have long urged that the process be reformed.⁶

Even though the merger review process has become increasingly unseemly, the resulting actions usually do not raise particularized constitutional concerns (as opposed to perhaps generalized due process concerns). That is not the case here, of course. It is clear that Commission action compelling Sirius-XM to set aside channel capacity for entities that meet preferred racial or ethnic classifications is highly constitutionally suspect. Since the Supreme Court's *Adarand* decision,⁷ race-based government classifications are reviewed under a strict scrutiny test requiring a showing the classification serves a compelling government interest.

Following *Adarand*, the D. C. Circuit determined that the FCC's race-based EEO rules violated the equal protection clause because they could not be justified on the basis they promoted diverse programming that appealed to minority tastes. The court held that "diverse programming" was not a compelling government interest that would satisfy *Adarand's* strict scrutiny requirement.⁸ Without belaboring the point here, the Commission has recognized many times, post-*Adarand*, that race-based mandates claimed to be justified on the basis they promote diverse programming are not likely to

⁶ See, for example, Randolph J. May, "Reform the Process," National Law Journal, May 30, 2005, available at: http://www.freestatefoundation.org/images/Reform_the_Process--NLJ.pdf; Randolph J. May, "Any Volunteers," Legal Times, March 6, 2000, available at: http://www.freestatefoundation.org/images/Any_Volunteers--Legal_Times.pdf

⁷ *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

⁸ *Lutheran Church – Missouri Synod v. FCC*, 141 F. 3d 344, 354 (D.C. Cir. 1998), *petition for reh'g denied*, 154 F. 3d 487, *petition for reh'g en banc denied*, 154 F. 3d 494 (1998).

pass constitutional muster. For example, last year, the Commission stated: "[P]arties who contend that a race-conscious classification would be the best approach, or indeed even a permissible approach, to encourage ownership diversity and new entry must explain specifically, using empirical data and legal analysis, how such a classification would not just be tailored, but narrowly tailored, to advance a governmental interest that is not simply important, but compelling."⁹ Certainly, there has been no attempt to make such a showing in the context of the Sirius-XM set-aside requirement, nor is it at all likely that had there been one it could succeed.

Conclusion

So, what to do? The Commission should abandon the ill-conceived notion that it will determine the implementation details regarding the Sirius-XM minority ownership set-aside commitment. Presumably, the fact that the Commission, despite the earlier deadlines it set for itself, has delayed confronting the set-aside issue for so long means the Commission's counsel is aware that going down the implementation road is likely to be unconstitutional. And it is unlikely that convoluted strategies such as naming an "independent trustee" to oversee the commitment will avoid the constitutional predicament.

This seems to be a case in which the best course for the Commission is to act consistently with its words, that is, to act as if Sirius' "voluntary" commitment truly were voluntary. In this event, the Commission would leave Sirius to implement the commitment as the satellite provider sees fit without agency interference. Following this course would make sense in two respects. First, it would be consistent with the

⁹ In the Matter of Promoting Diversification of Ownership in the Broadcasting Services, 23 *FCC Rcd* 5922, 5950 (2008).

Commission's 2003 statement that “program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation.”¹⁰ As the Commission recognized, “[d]elivery systems compete fiercely for consumer attention and have powerful financial incentives to tailor their program offerings to serve consumers' diverse demands for programming.”¹¹ The existence of a marketplace with competing platforms, each with hundreds of "channels" that respond to consumer demands for diverse programming, renders any justification for Commission-mandated set-asides weak.

Second, acting in this case as if the Sirius-XM commitment truly were voluntary might be a step in the direction of Commission self-recognition that it ought to take steps to reform its merger review process so that it conforms more closely to traditional rule of law norms.

Respectfully submitted,

Randolph J. May

President
The Free State Foundation
P. O. Box 60680
Potomac, MD 20859
301-299-3182

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¹⁰ 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 *FCC Rcd* 13620, 13622 (2003).

¹¹ *Id.* at 13632.