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

In the Matter of	)	
Implementation of Sirius-XM Merger	)	MB-07-57
Condition That Four Percent of Audio Channels	)	
Be Leased To Qualified Entities and Extends the	)	
Deadline for Compliance with This Condition	)	

To the Media Bureau:

Reply Comments of iClick2Media Inc. and AlphaStar International, Inc.

Jeneba Jalloh Ghatt, Esq.
The Ghatt Law Group LLC
2 Wisconsin Circle, Suite 700
Chevy Chase, Maryland 20815
240-235-5028
Counsel to iClick2Media, Inc. and AlphaStar International, Inc.

Fatima Fofana, Esq.
Of Counsel

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iClick2Media, Inc. and International Inc, by its attorneys, hereby submits this Reply Comment in the above captioned proceedings in which the Media Bureau sought comment on the implementation of the merger condition for the "Third-Party Access Commitment" from the 2008 Order approving the merger between Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") (collectively, "Sirius XM").

In reply, iClick2Media, Inc., and AlphaStar International Inc., state as follows:

I. The Commission Should Implement the Set-Aside Using A Method That Will Get The Best New Independent Voices Launched on Satellite Radio, Fast, Efficiently And Without Further Delay

There already have been several delays to implementation of the set-aside channels. To avoid further hesitation, the Commission should adopt the suggestions of commenters that will ensure the most efficient and expedient road to getting the independent channels launched on air.

A. The Commission Should Adopt a Definition of Qualified Entity That Would Overcome Constitutional Challenges

American Independent Radio ("AIR"), a creation of iClick2Media and AlphaStar, applauds the goals of the set-aside. Both parties agree with some commenters that the Commission may face constitutional challenge by retaining the current definition for Qualified Entity or Entities.[1] The risk to a challenge to the set-aside is the potential for further delay in getting new independent voices launched onto satellite radio. To overcome this hurdle, it may be

[1] *See* Comments of the Free State Foundation, generally, (stating that is doesn't believe that post Adarand, the Commission's race-based mandates claiming to be justified on the basis that they promote diverse programming are not likely to satisfy constitutional requirements); Comments of Mosaic Communications Partners at 1; Comments of Patrick Sharpless; and Comments of The Progress and Freedom Foundation at 1-4, MB Docket 07-57. Compare to other commenters suggesting that the Commission retain the race-based classifications i.e. Comments of RSS Networks and Comments of Radio One, Inc. at 2.

necessary for the FCC to do one of three things: (1) adopt a definition of socially and economically disadvantaged business entities for the Qualified Entity or Entities as suggested by Mosaic Communications Partners; (2) select an independent trustee to shield the Commission from constitutional scrutiny as iClick2Media and AlphaStar recommend; and/or (3) permit Sirius XM to select such a third party entity to administer the channels, as suggested by Mosaic, iClick2 Media and AlphaStar, and The Progress and Freedom Foundation.[2]

To overcome the potential hurdle, Mosiac Communications Partners suggests that the FCC adopt the socially and economically disadvantaged small business criteria for defining eligible entities.[3] Mosaic posits that the criterion was included in the American Recovery and Reinvestment Act of 2009 announcing the broadband deployment grants and the Commission should follow suit and adopt that definition.[4] iClick2Media and AlphaStar agree that the Commission should consider adopting this alternative as a viable and acceptable definition for ensuring a greater diversity of ownership. As presented in their initial comments, the goal of diversity reaches beyond diverse content but includes diversity of owners. Certainly, this definition encompasses both ideals. Moreover, a majority of minority-owned entities qualify under that definition, and by default the pool will inevitably include program content providers that would have qualified under the current race-based definition of Qualified Entity or Entities.

Second, in the alternative, the FCC could shield itself from potential taint and appoint an independent trustee to the task of administering the channels. Mosaic also favors the creation of an independent panel appointed by the FCC to review all applications including "individuals with media industry expertise and organizations that have focused on increasing minority media

[2] *See* Comments of Mosaic Communications Partners at 1-2; Comments of iClick2Media and AlphaStar and Comments of The Progress and Freedom Foundation at 5, MB Docket 07-57.
[3] Comments of Mosaic Communications Partners at 1.
[4] *Id.*

ownership and participation."[5] Even though Free State Foundation questions whether naming an "independent trustee" to oversee the set-aside commitment would work to avoid constitutional issues,[6] there indeed have been situations in the past where an administrative agency has passed on administering a merger condition, such is the case with the Federal Trade Commission.. If the Commission considers adopting this route, AIR is eager and willing to step up and be named that independent trustee. For the reasons stated in their initial comments and in other documents on the docket, iClick2Media and AlphaStar have the capacity and interest to assist with the set-aside and would be willing to administer the channels using a quasi-public process to ensure that the channels are divided up and broadcast among the widest amount of eligible programmers possible.

Third, as a final solution to ensuring an open road to getting the channels launched and avoiding further delay by possible challenges, the Commission can reauthorize Sirius XM to select the Qualified Entity to lease capacity or select the lease entities. Notwithstanding the objection of some parties[7] like Media Access Project and FluteRadio arguing that Sirius XM should not be allowed to select the independent entity,[8] it indeed may be necessary to reauthorize the merged entity's involvement in the selection process. Although iClick2Media and AlphaStar have a different reasoning than the Progress and Freedom Foundation, they nonetheless agree that Sirius XM could be permitted to participate in selecting who or what should be permitted to occupy channels on its capacity.[9] Like Mosaic, iClick2Media and AlphaStar also support the idea of Sirius XM's involvement as a member of the independent

[5] Comments of Mosaic at 2.
[6] Comments of Free State Foundation.
[7] Comments of MAP at 2.
[8] *See* Comments of the Media Access Project at 2, (although it seems to be fine with Sirius XM being involved if it were the entity to select the applicant based on a lottery.) *Id.* *See also* Comments of FluteRadio at 2.
[9] Comments of The Progress and Freedom Foundation at 5.

panel.[10] Mosaic is correct that Sirius XM's input may ensure the compatibility and suitability of the Qualified Entity for the satellite radio service. Furthermore, a solution to withstanding constitutional scrutiny may be to permit Sirius XM to elect the channels and remove the burden, and potential taint from the FCC to administer and assign them using race-based classifications.

Moreover, to the extent that the Commission may not have the resources, time or ability to select the independent entity, AIR urges the Commission to be given the authority to administer the channels, select the panel and ultimate programmers on the channel. It is the goal of AIR to help diversify the satellite radio platform and to encourage the launch of new and independent programmers and program choices. A public-private partnership with the Commission could assist in that effort.

B. A First Come, First-Serve or Lottery Basis May Not Lead to The Best Candidate

iClick2Media and AlphaStar understand the efficacy of the Media Access Project and FluteRadio's suggestion that the channels be administered on a first-come, first-serve basis and then by lottery.[11] However, as iClick2Media and AlphaStar stated in their initial comments, neither of those models guarantees the best possible programmers. Instead, they are based on a foot race through the application process and then luck. There are better alternatives still available, such as implementing options through an independent trustee or through a committee. A thoughtful process involving the public and a committee of trusted activists and those who care and work in this area would ensure that the best quality in original content, diverse and capable programmers is launched on the air.

[10] Comments of Mosaic Communications Partners at 2.
[11] Comments of Media Access Project at 1; and Comments of Flute Radio at 1-2 in Docket 07-57

C. To Encourage Cooperation and Seamless Coordination, the Entity or Entities Selected Should Indemnify Sirius XM and be Completely Independent

Radio One suggests that applicants should be willing and able to indemnify Sirius XM from any liability arising from lapses in compliance.[12] As iClick2Media and AlphaStar argued in their initial comments, one clear means of ensuring seamless processing in launching the channels would be to eliminate any potential hurdles or opposition. One such way would be to ensure that Sirius XM is not in any way affected or responsible for the content that is broadcast on the independent channels. iClick2Media and AlphaStar's proposed independent entity AIR, would indemnify Sirius XM and be responsible entirely for the content. Indeed, to maintain the complete independence of the channels, Sirius XM should be relieved of the obligation of having to monitor and be responsible for the content. If the channels are to be truly independent, it may take an entity like AIR to undertake that obligation, and relieve Sirius XM from the responsibility.

II. The FCC Should Not Adopt a "Super Channel" Structure For Audio Channels Because it Creates a Discriminatory Tiered System Based on National Cumulative Ratings

Radio One proposes that the 12 channels be divided into two groups; one group would consist of three channels on the Sirius platform that would also be on three corresponding XM channels, and vice versa—each a "Super Channel;" and the second group, the remaining six channels would be non-simulcast channels allocated to small programmers.[13] The three Super Channels, Radio One recommends, should be awarded to operators with programming targeted to the three largest minority groups – African American, Hispanic and Asian

[12]Comments of Radio One at 2.

[13] Comments of Radio One at 2. An applicant for a Super Channel must certify that it has the resources and experience to provide programming around the clock and to the largest U.S. minority audiences. Specifically, the applicant must own or operate stations in at least 10 geographically dispersed markets. *Id* at 3.

Americans. Specifically, the proposed method of awarding the Super Channel licenses is based on the eligible broadcasters' total national cumulative rating across all of such applicants' owned broadcast stations for the minority group that they are applying to serve.[14]

At first, this method of awarding the 12 audio channels appears equitable and objective. However, the idea of a Super Channel creates a discriminatory tiered ranking system based on the applicants broadcast station's popularity utilizing the Arbitron rating system. It favors large broadcasters that own stations in large radio markets and who command sizeable audiences and therefore have a higher Arbitron cumulative rating. It also fails to promote enough diversity of ownership, and is not based on a truly objective criteria. Instead, this method creates a ranking system that discriminates against broadcast owners that may provide equally diverse and quality programming, yet have a low national cumulative rating. Although Radio One argues that the awarding of Super Channels is objective because the party that will select the applicant will avoid the need to compare competing applicants,[15] in essence, using the national cumulative rating system does exactly that. It compares the ratings of one broadcaster against another—and the larger broadcaster will more than likely be awarded a Super Channel based on this final criteria.

Instead, as mentioned in AIR's initial comments, the Commission should adopt a "quasi-public" selection process whereby it would establish a selection board made up of members of the community who have knowledge and experience in the broadcast industry.[16] AIR would provide the bios of the proposed committee members to the public for comment and review. This board would then be responsible for reviewing each application and ultimately

[14] Comments of Radio One at 3.
[15] *Id.* at 4.
[16] Comments of iClick2Media and AlphaStar, International at 9.

awarding the channels to operators. Throughout this procedure, the public would be able to review and comment on the selection process.

The method suggested by AIR would be efficient and not burdensome; the criteria would not discriminate by comparing the national ratings of one large broadcaster against another, nor would it create a superficial tiered system. Furthermore, the process would eliminate a barrier to providing immediate content diversity onto the 12 channels.

III. Programmers Should Be Subject to Short Term Lease Periods

RSS Network proposes a 10-year lease term so that lessees can secure investment capital for programming needs and other ongoing expenses.[17] Although this may be suitable for the Qualified Entity or Entities, AIR proposes a shorter period for programmers that provide limited programming or blocks of programming. The purpose of a shorter period is twofold. First, lessees would be encouraged to continue to provide quality programming because if a program or channel failed to meet the needs of the community, its lease would not be renewed; and secondly, a shorter renewal cycle would maximize the amount of programmers that can appear on the air.

IV. Conclusion

Based on the above recommendations, iClick2Media and AlphaStar International, Inc., together AIR, urge the Commission to implement those suggestions that will usher in the fastest route to getting diverse programming content on the satellite platform. As part of that objective, iClick2Media and AlphaStar recommends that their independent entity, American Independent

[17] Comments of RSS Network at 12. A lengthy lease term would allow lessees to develop a solid business plan according to RSS's comments. In addition, Sirius XM will be armed with the knowledge that lessees will remain committed to the lease terms and conditions for the long haul. *Id.*

Radio, be selected as an independent trustee to administer the stations quickly efficiently and by using a quasi-public process..

Respectfully submitted,

Jeneba Jalloh Ghatt, Esq.
The Ghatt Law Group LLC
2 Wisconsin Circle, Suite 700
Chevy Chase, Maryland 20815
240-235-5028
Counsel to iClick2Media, Inc. and AlphaStar International, Inc.

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