

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of:)
)
Applications for Consent to the) MB Docket No. 07-57
Transfer of Control of Licenses)
)
XM Satellite Radio Holdings Inc.,)
 Transferor)
)
and)
)
Sirius Satellite Radio Inc.,)
 Transferee)
)

To: The Secretary

REPLY COMMENTS OF ENTRAVISION COMMUNICATIONS CORPORATION

Entravision Communications Corporation (“Entravision”), a diversified Spanish-language media company that has, for nearly fifteen years, operated both radio and television stations in service to the Hispanic community, by its attorneys, hereby submits these Reply Comments in the above-referenced proceeding concerning the third-party access commitment (“Third-Party Access Commitment”) made by XM Satellite Radio Holdings Inc. (“XM”) and Sirius Satellite Radio Inc. (“Sirius”) in connection with the Commission’s approval of the transfer of control of licenses and authorizations held by Sirius and XM (the merged entity, Sirius XM Radio Inc., referred to as “Sirius XM”).¹ As described below, Entravision generally supports the

¹ 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*, Public Notice, MB Docket No. 07-57, DA 09-529, released February 27, 2009 (“Public Notice”).

implementation plan outlined in the comments filed by Radio One, Inc. ("Radio One"),² subject to significant and necessary revisions involving channel allocation and eligibility criteria. In support thereof, Entravision states as follows.

In its Comments, Radio One proposes splitting the 12 channels to be leased by Sirius XM under the Third-Party Access Commitment into two separate channel groups – simulcast channels (Radio One calls these "Super Channels") and non-simulcast channels. Under Radio One's plan, the simulcast channels would occupy a total of six channels, with three channels on Sirius and three on XM. Programmers vying for these channels would have to satisfy rigorous eligibility standards, and the successful lessees' programming would be simulcast on both the Sirius and XM platforms. Radio One would split the remaining six channels evenly between Sirius and XM, and would award these channels on a non-simulcast basis to various programmers under much less demanding eligibility requirements.

In the interests of achieving a readily workable Third-Party Access Commitment plan, and in securing well-qualified lessees and achieving successful third-party SDARS operations, Entravision submits that Radio One's simulcast channel plan should be modified in a manner that makes it applicable to all twelve channels. That is, instead of having any non-simulcast channels, Sirius/XM should lease channels to one or more well-qualified programmers whose programming will appear on one or more channels on the Sirius platform and one or more corresponding channels on the XM platform. Not only would this approach create a less complicated, more manageable program structure, it would also guarantee that experienced

² See *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. Applications for Consent to Transfer of Control*, MB Docket No. 07-57, Comments of Radio One (filed March 30, 2009) ("Radio One Comments").

broadcasters with sufficient financial resources and ample programming capabilities are selected for the challenging task of initiating and maintaining third-party SDARS operations for the term of their leases.

Were the Commission not to approve simulcast, Entravision foresees issues that could be harmful to the goals of the access commitment. Perhaps the most significant would be that the program suppliers who lease any non-simulcast channels will have to engage in multiple vigorous marketing and promotional campaigns that can be expected to be unnecessarily costly and confusing to the minority population. Entravision would expect that a critical part of such marketing promotional activity would be to identify XM or Sirius as the service where their programming is available and to urge potential subscribers to sign up with their particular platform. With providers urging minority group members to opt for different SDARS platforms, potential subscribers may well not be able to reach a decision as to which platform is best for them to sign up for. Rather than potentially lead to such confusion and customer unwillingness to subscribe, and in light of Sirius XM's own efforts to identify itself as a single service,³ Entravision urges the Commission to require that the cross-platform model be adopted for all programming under the Third-Party Access Commitment, until such time as there is true interoperability between the two program services such that XM and Sirius programming are available to all subscribers without regard for their underlying service platform.

Entravision also submits that the basic eligibility criteria set forth by Radio One for its simulcast channels remain appropriate criteria to apply under an all-simulcast channel plan and for all potential program providers. According to Radio One, to be basically eligible for a

³ A review of Sirius XM promotional materials evidences to the public that they can purchase the best of both services when they become an XM or Sirius customer.

simulcast channel, an entity must be able to certify that it has successfully owned and/or operated broadcast stations in at least 10 geographically-dispersed markets and that it has sufficient financial resources to provide programming 24 hours a day, seven days a week. Additionally, Radio One proposes that a program provider must evidence a demonstrated commitment to serving a minority audience with its programming, must be willing to sign for a minimum five-year lease term, must be capable of providing Sirius XM appropriate indemnification, and must not currently operate on any channels on either Sirius or XM.⁴ Entravision believes these basic criteria are necessary and sufficient to ensure that only well-qualified parties will be able to lease the simulcast channels and promptly establish successful and sustainable third-party SDARS operations. Without requiring such basic qualifications, the successful program suppliers will not be able to offer and promote program services that will attract listeners to the SDARS services, thereby rendering the Third-Party Access Commitment a failure.

The only eligibility criterion proposed by Radio One, with which Entravision takes substantial issue, is Radio One's insistence on strict adherence to its version of a "Qualified Entity" standard – a 51 percent or greater minority-based voting control requirement.⁵ While the Third-Party Access Commitment is voluntary on the part of Sirius XM, the Commission's involvement in the design and implementation of the lease program nonetheless raises familiar

⁴ While not mentioned, it should be left to the program provider to decide if it wishes to finance its operations on an advertiser-supported basis, a non-commercial basis, or by attempting to work out some subscription or combination basis with Sirius XM. However, no economic approach should be favored over another.

⁵ See *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, 23 FCC Rcd 12348, 12408, ¶ 131 (2008) ("*Sirius-XM Order*"). A "Qualified Entity" included an entity that is majority-owned by persons who are African-American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics. *Id.* at 12409, ¶ 134 n. 437.

concerns about the constitutionality of race-based classifications employed in Commission initiatives designed to advance minority ownership and operation of media outlets.⁶ In order to minimize any concerns over the legality of a program implementing the Third-Party Access Commitment, Entravision suggests that a flexible, comprehensive consideration of an eligible entity's ties to and service on behalf of minority communities is preferable to a strict application of a 51 percent requirement, be it minority ownership or minority voting control.⁷

Evidence of a meaningful degree of minority ownership and/or voting control, in Entravision's opinion, should be set at a minimum of 25 percent minority voting control or 25 percent of board membership being minority group members, combined with a clear, consistent and longstanding record of serving minority communities through the media, together with the rest of the eligibility criteria set forth above. The presence of these supporting factors should provide a more constitutionally-palatable means to the same ends of furthering the "Commission's goals of fostering competition and diversity on the SDARS platform."⁸ A fluid, nuanced consideration of several different variables, along the lines of the "'full file' review"

⁶ See *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to all race-based classifications). See also *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rule Making, 23 FCC Rcd 5922, ¶ 82 (2007) ("*Diversity Order*") (noting that "any race conscious measure the Commission might adopt to promote minority ownership would be subject to strict scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment").

⁷ Radio One itself implicitly recognizes the problems inherent with the "Qualified Entity" requirement as it speaks to voting control and not ownership by minority group members. As a publicly-owned entity, Radio One represents one of the achievements of minority group members: the ability to create a viable enterprise and to convince the public to invest in an enterprise where voting control and management remain in the hands of minority group members. Entravision, also a publicly held company, believes that the ability of minority group members to grow their enterprise and take it public in continued service to minority group customers should not exclude them in any manner.

⁸ *Public Notice* at 1-2 (quoting *Sirius-XM Order*, *supra*, 23 FCC Rcd at 12408, ¶ 131).

proposed in the *Diversity Order*,⁹ offers the opportunity to attract potential program providers who are capable, especially in this period of economic difficulty and weakness in media markets, of providing service to minority group members and a better chance of surviving legal scrutiny than strict application of a race-based, ownership or voting percentage test.

Entravision submits that the Commission, in adopting a selection process, should be guided by a goal of seeking as many eligible and qualified parties that can immediately begin service to the minority group public. If there is any element of the selection process that is critical to the ultimate success of the Third-Party Access Commitment, it is the ability of the program provider to begin service within thirty days and to have the resources to maintain the program service throughout the lease term. In the case of a party that has nothing more than a vision, that should not be enough. The economic environment in the media marketplace is such that a party without capital of its own, together with personnel and equipment, is not going to be able to place into effect the program service in a reasonable period of time, and, in all likelihood, at any time. Thus, if the Commission is to ensure that minority groups are served by programming on Sirius XM, experience and the financial wherewithal to serve minority populations must be paramount considerations.

Finally, Entravision wishes to address one point noted by the Commission in its *Public Notice*. Entravision submits that since leasing and technical arrangements will necessarily involve Sirius XM, that Sirius XM must be engaged in the selection process. Of course, if Sirius XM is involved in the process, there should remain the ability of a party to request review by the Commission in order to ensure that Sirius XM is effectuating its commitment to the

⁹ See *Diversity Order*, *supra*, 23 FCC Rcd at ¶ 84.

