

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

In the Matter of:)	
Implementation of the Third-Party)	MB Docket No. 07-57
Access Commitment in the Sirius-XM)	DA 09-529
Merger)	
)	

Reply to Comments by Hispanic Information and Telecommunications, Inc.

Hispanic Information and Telecommunications, Inc. (“HITN”), by its attorneys, hereby submits this reply in response to comments filed in the Media Bureau’s Public Notice in the above captioned matter.¹ In that Notice, the Media Bureau sought comments on how to implement Sirius XM Radio, Inc.’s (“Sirius XM”) voluntary commitment to lease four percent of its combined audio channels to Qualified Entities. Some commenters suggested the set aside was unconstitutional; their arguments are clearly misplaced as the set aside is a voluntary commitment by Sirius XM. Many commenters recommended the Commission require that Qualified Entities be majority-owned by persons of minority groups. While this requirement would promote diversity in media ownership, it would not necessarily promote diversity in programming targeted to minority groups. Therefore, the Commission should require that Qualified Entities be controlled by members of one or more minority groups and be nonprofit entities with an educational mission. Some commenters suggested that an independent agency be charged with selecting the Qualified Entities. Such a suggestion is unwise as setting up the agency would create tremendous delays in utilizing the set aside. Suggestions that Qualified

¹ *Media Bureau Seeks Comment on Implementation of Sirius-XM Merger Conditions 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 (rel. Feb. 27, 2009) (“Notice”).

Entities be granted a lease term of sufficient time are prudent; while the recommendation for a Super Channel appears self-serving and contrary to the purpose of the set aside.

I. Introduction

Founded in 1981, HITN is a not-for-profit 501(c) corporation whose mission is to promote educational opportunities for Hispanic Americans through multiple media outlets and telecommunications services. HITN-TV (www.hitn.tv) was created in 1987, becoming the first and only independent 24-hour-a-day Spanish language public interest television channel in the United States. Today, HITN-TV can be found on cable, Dish and DirecTV satellite, video on demand, and online, reaching more than 31 million households. HITN also has provided satellite-delivered telecommunications services to schools and libraries in Puerto Rico under the federal e-rate program. HITN is the largest holder of Educational Broadband Service (“EBS”) spectrum in the United States, with spectrum in more than 80 markets covering over 100 million people in the U.S. and Puerto Rico. Through a partnership with Clearwire Corporation, HITN plans to provide WiMAX 4G wireless services to educational institutions and non-profits nationwide using this spectrum.

HITN is a unique source of educational, cultural, news, and public affairs programs to Hispanics in the United States and Puerto Rico. Since its inception, HITN has worked with community-based organizations serving and representing the Hispanic community. HITN’s unique and close relationship with Hispanic organizations like the Congressional Hispanic Caucus Foundation, the U.S. Hispanic Chamber of Commerce, LISTA, LULAC, NCLR, NALEO, Aspira, and virtually every major Latino organization provides a strong audience base from the membership of these organizations and an opportunity for Hispanics and non-Hispanics alike to have a glimpse into what is happening with the exciting, vibrant and growing Hispanic

community. These relationships allow HITN to produce programming originating from the conventions, events, and meetings of Latino organizations as well as showcase those proceedings on www.hitnonline.tv.

II. Discussion

A. Constitutional Arguments are Misplaced; the Commitment was Voluntary and Promotes Minority Media Ownership and Ensures Underrepresented Populations are Served.

The constitutional arguments set forth by the Progress and Freedom Foundation, the Free State Foundation, and Mosaic Communications Partners, LLC (“Mosaic”) are misplaced.² First, there is no government action. The set aside was a *voluntary* commitment.³ When two players become one in any media outlet the public is deprived of diversity in programming. This is especially true for minority audiences, especially those minority groups speaking a foreign language, who already suffer from a general lack of programming targeted to them. Recognizing the potential harm its consolidation could have on these groups, Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. made a voluntary commitment to serve these groups by reserving four percent of their combined audio channels to Qualified Entities.

Second, Sirius XM holds the radio airwaves in public trust and the minority set-aside fulfills a compelling public interest -- diversity in our airwaves. African American, Asian, Pacific Islanders, American Indians, Alaskan Natives, and Hispanics are underrepresented populations in media. These populations have historically lacked access to the public airwaves. As acknowledged by Acting Chairman Michael J. Copps, in his capacity as Commissioner, minority

² Comments of Progress and Freedom Foundation, MB Docket No. 07-57, filed Mar. 30, 2009; Comments of The Free State Foundation, MB Docket No. 07-57, filed Mar. 27, 2009; and Comments of Mosaic Communications Partners, LLC, MB Docket No. 07-57, filed Mar. 30, 2009.

³ *In re Applications for Consent to the Transfer of Control of Licenses*, MB Docket No. 07-57, *Memorandum Opinion and Order* (rel. Aug. 5, 2008) (“Sirius XM Merger Order”) at ¶ 134.

groups continue to lack access to media outlets: “Women and minorities own low single-digit percentages [sic] of America’s broadcast outlets and big consolidated media continues to slam the door in their faces.”⁴ The set aside, therefore, promotes the public interest and diversity by encouraging minority media ownership in addition to ensuring underrepresented populations receive programming targeted to their unique needs.

B. The Qualified Entity Should Be Controlled by Persons of Minority or Underrepresented Populations, Have Experience and Operations with Programming Content, And Should Be a Nonprofit Corporation with an Educational Mission

HITN agrees with certain commenters to the extent that, as suggested in the Order,⁵ a Qualified Entity should at least be controlled “by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics.”⁶ As stated above, these groups have historically lacked access to the public airwaves. By requiring Qualified Entities to be controlled by persons who are underrepresented in media, the Commission will come closer to realizing one of its long standing goals – diversity in media ownership.⁷

Media Access Project’s comments made an additional argument, suggesting that, for purposes of the noncommercial educational set aside, the definition of noncommercial educational and informational programming should be “an entity with an educational mission

⁴ *In re Promoting Diversification of Ownership in the Broadcasting Services, et al., Order and Further Notice of Proposed Rulemaking*, MB Docket Nos. 07-294, 06-121, 02-277, 01-235, 01-317, 00-244 and 04-228), Statement of Commissioner Michael J. Copps (Mar. 2008).

⁵ Sirius XM Merger Order at fn 437.

⁶ *See, e.g.s*, Comments of Radio One, Inc., MB Docket No. 07-57, filed Mar. 30, 2009; and Comments of RSS Network Corporation, MB Docket No. 07-57, filed Mar. 30, 2009.

⁷ *See, e.g., In re Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking*, MB Docket No. 07-294 (rel. Apr. 25, 2008).

that is organized under the tax code as a nonprofit corporation.”⁸ This definition is apt and should be an additional requirement for Qualified Entities on the minority set aside. Requiring Qualified Entities to be controlled by individuals of an underrepresented group will promote the Commission’s goal of diversity in media ownership but is not necessarily enough to ensure diversity in programming. Programming targeted to the unique needs of minority populations is generally unavailable to minority groups because radio programmers cater to majority groups where the opportunity for profit is greater. Minority audiences need programming that includes informative and educational information on local and national political candidates and news and instructional information on such topics as English as a foreign language. A nonprofit entity with an educational mission is much more likely to fulfill these sorts of needs, especially a nonprofit entity that is controlled by individuals of the underrepresented group it serves.

C. Selection of Qualified Entities should be Determined by the Media Bureau in Consultation with the Applicants

Mosaic’s and iClick2 Media/AlphaStar’s suggestions that there be an independent selection entity are imprudent. Setting up such an entity will only delay the selection process, further prolonging the broadcast of radio programming targeted to minority and underrepresented populations. Instead, the selection of Qualified Entities should be determined solely by the Media Bureau in consultation with the applicants.

D. Qualified Entities Should be Granted a Level of Certainty that they will be Allowed Continued Carriage on the Set-Aside.

Media Access Project suggests that “each programmer should be granted a level of certainty that it will be allowed continued carriage on the set-aside.”⁹ HITN agrees. To

⁸ Comments of Media Access Project, MB Docket No. 07-57, filed Mar. 30, 2009 at 2.

⁹ *Id.*

incentive Qualified Entities to produce the highest quality programming, the Commission should ensure they have a sufficiently long lease term on their set aside channel to justify serious investment. The Commission should require lease terms of at least five years. A shorter lease term will deprive Qualified Entities the necessary assurances to invest in and produce quality programming, thereby depriving their underrepresented audiences of the same.

E. The Commission Should Limit One Channel Per Qualified Entity

Radio One, Inc.'s Super Channel proposal and Mosaic's proposal to allow a Qualified Entity to lease up to six channels seems unwise and self-serving.¹⁰ The Qualified Entity set-aside provides an opportunity to promote diversity in our airwaves. Permitting one Qualified Entity access to more than one channel would, in direct contradiction to its purpose, create uniformity on the four percent set aside. The FCC should instead limit each Qualified Entity to one channel. This will allow a total of 12 Qualified Entity programmers with the necessary capacity to provide minority audiences with quality programming tailored to their interests. Dividing channels into time slots, as some commenters suggested, would be confusing to audiences and would not provide the incentive for Qualified Entities to produce quality programming.

¹⁰ Comments of Radio One, Inc., MB Docket No. 07-57, filed Mar. 30, 2009 at 2 (recommending the Commission split the 12 channels into two groups: "The first group would consist of three channels on Sirius that would be simulcast on three corresponding XM channels, and vice versa (each, a "Super Channel"), while the second group would consist of the remaining six channels, which would be split evenly between XM and Sirius."); Comments of Mosaic Communications Partners, LLC, MB Docket No. 07-57, filed Mar. 30, 2009 at 2.

III. Conclusion

For the foregoing reasons, HITN proffers that Qualified Entities should be nonprofit entities controlled by persons who are African American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics. HITN urges the Commission to reject proposals to establish an independent selection entity. Instead, the selection of Qualified Entities should be determined solely by the Media Bureau in consultation with the applicants. In addition, the Commission should ensure Qualified Entities have a sufficiently long lease term of at least five years on their set aside channel. Finally, each Qualified Entity should be limited to one channel.

Respectfully submitted,

HISPANIC INFORMATION AND
TELECOMMUNICATIONS NETWORK,
INC.

By: 

Rudolph J. Geist
Clare C. Liedquist
RJGLaw LLC
7910 Woodmont Avenue, Suite 1400
Bethesda, MD 20814
(240) 821-9850