

November 18, 2009

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: *Notice of Ex Parte Presentation*  
Media Bureau Docket No. 07-57

Dear Ms. Dortch:

On November 17, 2009, representatives of Howard University met in separate meetings with Sherrese Smith, Legal Advisor to Chairman Julius Genachowski; Rick Kaplan, Legal Advisor to Commissioner Mignon Clyburn; Rosemary Harold, Legal Advisor to Commissioner Robert McDowell; Joshua Cinelli and Jamila Bess Johnson, legal advisors to Commissioner Michael Copps; and Bradley Gillen and Millie Kerr, legal advisors to Commissioner Meredith Attwell Baker. Participating in the meetings on behalf of Howard University were Jim Watkins, General Manager of WHUR radio, and the undersigned.

The Howard University representatives urged prompt implementation of the Sirius XM set-aside commitment for Qualified Entities. In order to facilitate prompt implementation, the Howard University representatives argued that the set-aside commitment should be implemented in a manner that avoids unnecessary complexity or the legitimate threat of a judicial challenge. To this end, the Howard University representatives provided several specific recommendations.

First, the Commission should direct Sirius XM to implement and manage its set-aside channels, including the selection of Qualified Entities. This is consistent with other channel set-aside requirements that have been adopted by the Commission, such as public interest programming requirements for the Satellite Digital Audio Radio service and Direct Broadcast Satellite service, and children's educational programming requirements for television broadcast licensees. In contrast, involvement by the Commission in the selection process could raise judicial challenges. Further, the use of a third-party administrator would inevitably be complex and result in significant further delay in the implementation of the Sirius XM set-aside commitment.

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Second, the Commission should impose only minimal requirements on Sirius XM in its selection of Qualified Entities. For example, Howard University supports a requirement that Qualified Entities must demonstrate that they can promptly provide original and diverse nationwide satellite radio programming on a 24/7 basis to historically underserved audiences. Such a requirement retains the original intent of the Sirius XM commitment, while significantly reducing the threat of protracted judicial review. Further, such a revised requirement focuses appropriately on the needs of consumers (historically underserved audiences) rather than the characteristics of the programmer (majority minority-controlled). In doing so, the modified approach further ensures that the public interest will be served by the implementation of the Sirius XM requirements.

During certain of yesterday's meetings, discussion took place regarding whether the Commission can implement such an approach using the current record of the proceeding without issuing a public notice seeking further comment. Howard University strongly believes that the existing record is fully adequate to support the Commission's adoption of the modified requirements discussed above. Administrative procedure permits the Commission to take action in a proceeding if the action is a "foreseeable outcome of the proceeding."<sup>1</sup>

The Commission clearly indicated in its February 27, 2009 public notice seeking comment on its implementation of the Sirius XM commitment that parties should address, *inter alia*, "the definition of a Qualified Entity or Entities, the process for establishing eligibility, [and] the technical and financial qualifications of lessees."<sup>2</sup> The Commission's request for comment on the definition of Qualified Entities makes it foreseeable that the Commission might modify the definition, which was already articulated in the merger order.<sup>3</sup>

Further, many of the parties that filed comments in response to the Commission's public notice recognized that the definition of Qualified Entities may be changed and advocated either in support of or against such modifications. For example, numerous parties urged the Commission to abandon a race-based criteria and refrain from Commission involvement in the

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<sup>1</sup> In the Matter of Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Memorandum Opinion and Order*, 20 FCC Rcd 16015, 16029-30, ¶ 32 (2005).

<sup>2</sup> *Public Notice*, "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," DA 09-529 (Feb. 27, 2009).

<sup>3</sup> 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, 124089 ¶ 134 n.437 (2008) (concluding that a Qualified Entity includes 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).

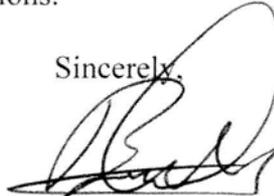
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selection process.<sup>4</sup> Such a stance is not inconsistent with the position that Howard University advocated in its *ex parte* meetings and demonstrates that the adoption of Howard University's recommendations would be a foreseeable and appropriate outcome in this proceeding.

The attached talking points were distributed to the participants of the meetings and formed the outline for much of the discussion. Thank you for your attention to this matter. Please let us know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Olcott", written over a horizontal line.

Bruce A. Olcott

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<sup>4</sup> See *Comments of Randolph J. May, President, The Free State Foundation*, MB Docket No. 07-57, at 4-5 (March 27, 2009); *Comments of The Progress & Freedom Foundation*, MB Docket No. 07-57, at 3-4 (March 30, 2009); *Reply Comments of Entravision Communications Corporation*, MB Docket No. 07-57, at 6 (April 14, 2009); *Comments of iClick2Media Inc. and Alphastar International, Inc.*, MB Docket No. 07-57, at 2 (March 31, 2009); *Reply Comments of iClick2Media Inc. and Alphastar International, Inc.*, MB Docket No. 07-57, at 4-5 (April 13, 2009).

**Proposed Procedures for Implementing  
The Sirius XM Third-Party Access Commitment**

**Howard University**

**MB Docket 07-57**

**November 17, 2009**

- The Commission should modify the Sirius XM commitment that was adopted in its merger order if such changes will avoid further delay and the threat of judicial review.
  - The Commission should eliminate the requirement that Qualified Entities be majority minority-owned, or primarily serve minority audiences.
  - The Commission should require Sirius XM to select the Qualified Entities employing the following basic requirements:
- Qualified Entities must be required to provide original and diverse programming on a 24/7 basis to historically underserved audiences.
  - Applicants should be required to demonstrate they have the internal resources to produce original and diverse programming to serve underserved audiences.
  - Applicants should commit to commencing service shortly after lease award.
  - Preference should be given to entities with an educational mission and a plan to provide educational programming.
  - Such requirements will preserve the underlying intent of the Sirius XM commitment, while reducing the likelihood of protracted litigation.
- The Commission should refrain from altering the definition of Qualified Entities in a manner that may inadvertently disqualify applicants that could serve the public interest.
  - The Small Business Administration's "Socially and Economically Disadvantaged Businesses" standard may disqualify applicants such as Howard University.
  - Even the standard that was adopted in the Sirius XM order that a Qualified Entity be majority minority-owned would need to be clarified to indicate that, in the case of an institution such as Howard University (which is not "owned" by anyone), it is sufficient for the applicant to be majority minority-controlled.
- The application process should not rely on potentially arbitrary selection methods.
  - Refrain from employing a lottery, auction, or a first-come, first-served process.
  - Refrain from giving preference either to entities that have no media ownership interests (which may not be capable of programming a channel), or to entities with large media holdings (which may not promote sufficient diversity).
- Applicants should be permitted to apply for the right to program more than one channel, and to request access to simulcast channels on both the XM and Sirius systems.