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

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

MAILED
OCT 21 2010
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MEMORANDUM OPINION AND ORDER

Adopted: October 18, 2010 **Released: October 19, 2010**

By the Commission: Chairman Genachowski and Commissioners Copps and Clyburn issuing separate statements.

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I. INTRODUCTION

1. In this *Memorandum Opinion and Order* ("Order"), the Commission adopts the implementation details for the voluntary commitment made by Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") to lease a portion of their channel capacity to Qualified Entities as a condition of the Commission's approval of the transfer of control of licenses and authorizations held by Sirius and XM.[1] Specifically, Sirius and XM voluntarily committed, among other things, to enter into

[1] On July 25, 2008, the Commission approved the transfer of control of licenses and authorizations subject to the Applicants' fulfillment of several voluntary commitments and other conditions. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12408, 12410-11, 12434-35, ¶¶ 1, 131, 135 & App. B (2008) ("*Sirius-XM Merger Order*"). We refer to Sirius Satellite (continued....)

long-term leases or other agreements to provide Qualified Entities with rights to four percent of the full-time audio channels on the Sirius platform and four percent of the full-time audio channels on the XM platform ("Leasing Condition").[2] This Order provides the implementation details for the Leasing Condition that were left outstanding in the *Sirius-XM Merger Order*. This action represents an important step that will promote access for new entrants and more diverse programming in the satellite digital audio radio service ("SDARS"). The implementation details we adopt for the Leasing Condition are specifically tailored to the unique circumstances of the Sirius XM merger, and we conclude they are consistent with the goals stated by the Commission when Sirius XM's voluntary commitment to set aside channels for third-party access was accepted as a condition of the merger.

2. In this Order, based on the additional record developed in response to the Public Notice requesting comment on implementation of the Leasing Condition,[3] we revise two of the provisions of the Leasing Condition adopted in the *Sirius-XM Merger Order*. First, we conclude that based on the record in this proceeding, we will define the term "Qualified Entities" to ensure that lessees are independent from Sirius XM and to make the criteria for selection of lessees race-neutral. This change avoids constitutional challenges and litigation that could delay and detract from progress in satellite radio.

3. We also decide, based on the additional record, to involve Sirius XM in the lessee selection process, with responsibility for making timely selections of entities that are both qualified for the set-aside and technically compatible with the SDARS platform, but without editorial control over lessees' programming. We conclude that it is in the public interest and consistent with other third-party leasing precedents for Sirius XM to select the lessees and reverse our previous decision to the contrary. We require Sirius XM reasonably to exercise its good-faith judgment to select as lessees those Qualified Entities that it believes will advance our diversity goals. We expect that Sirius XM will use this selection process to create opportunities for a variety of programmers, including new entrants. We provide instructions on the allocation of capacity, establish requirements for transparency in the selection process, and offer guidance on certain contract implementation issues. We leave other details to be negotiated in good faith between Sirius XM and its lessees.

4. In order to ensure that any lessee selected by Sirius XM satisfies the criteria set forth herein, we require Sirius XM to submit its selections for proposed lessees to the Media Bureau for review prior to signing an agreement for the lease channel or channels. We require Sirius XM to enter into leasing agreements with its selected Qualified Entities on the implementation deadline of April 17, 2011. We also require Sirius XM to file a report with the Commission within 30 days after the implementation deadline to identify the lessees with whom it has entered into leasing agreements, and to inform the Commission when it plans to air new programming pursuant to its new leases. Additionally, we permit aggrieved parties to file complaints with the Commission consistent with the parameters set forth below.

5. Several commenters in the merger proceeding voiced concerns that the merger of the sole two providers of satellite digital audio radio service would harm viewpoint and program diversity.[4] The

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Radio Inc. and XM Satellite Radio Holdings Inc. collectively herein as the "Applicants." The term "Applicants" also refers to the surviving post-merger entity, Sirius XM Radio Inc., or "Sirius XM."

[2] When the *Sirius-XM Merger Order* was released, four percent of the full-time audio channels represented six channels on the Sirius platform and six channels on the XM platform, for a total of 12 full-time audio channels. *Id.* at 12409-10, 12434-35, ¶ 134, App. B.

[3] *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*, MB Docket No. 07-57, Public Notice, 24 FCC Rcd 2855 (MB, rel. Feb. 27, 2009) ("*Public Notice*").

[4] *See* National Association of Broadcasters Petition to Deny at 30-32; American Antitrust Institute Comments at 7, 12-15; Entravision Comments at 17-18 (filed July 9, 2007); Prometheus Comments at 4-5 (filed July 9, 2007); Recording Industry Association of America Comments at 7 (filed July 9, 2007); Clear Channel Comments at 7 (filed July 9, 2007); Letter from Michael L. Barrera, President and CEO, United States Hispanic Chamber of Commerce to
(continued....)

Commission found that the Applicants' voluntary commitment to provide long-term leases addressed the diversity concerns raised by commenters and was consistent with the Commission's goals of fostering competition and diversity.[5] The Commission stated that it would determine the implementation details for the Leasing Condition at a later date.[6]

6. On February 27, 2009, the Media Bureau issued a *Public Notice* seeking comment on the implementation details of the Leasing Condition and extending the compliance deadline until May 29, 2009.[7] The *Public Notice* sought input on various implementation details, including the definition of a "Qualified Entity," the process for establishing eligibility, the technical and financial qualifications of lessees, the criteria for selecting among competing applicants where demand exceeds supply, the technical aspects of allocating capacity to lessees, the duration of the "long-term" leases, the involvement of Sirius XM in the selection process, and other terms and conditions of service. The *Public Notice* also invited interested parties to comment on whether there should be a single lessee or multiple lessees and, if there is more than one lessee, how much capacity should be allocated to any single lessee. The comments filed in response to the *Public Notice* propose a range of implementation approaches, which we discuss below.[8] On May 29, 2009, the Media Bureau extended the compliance deadline to June 29, 2009, and

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Thomas Barnett, Asst. Att'y Gen, Antitrust Div., DOJ and Kevin J. Martin, Chairman, FCC, at 2-3 (Aug. 28, 2007) ("USHCC Aug. 28, 2008 *Ex Parte*").

[5] *Sirius-XM Merger Order*, 23 FCC Rcd at 12410-11, ¶ 135.

[6] *Id.* at 12411, ¶ 135.

[7] *See Public Notice supra* n.3. The Media Bureau, on its own motion, previously extended the deadline for the Leasing Condition from November 28, 2008, until February 27, 2009. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Order, 23 FCC Rcd 17285 (MB, rel. Nov. 28, 2008). The Media Bureau, on its own motion, subsequently extended the deadline for the Leasing Condition until November 21, 2010. *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 25 FCC Rcd 11038 (MB, rel. Aug. 19, 2010). *See also Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 25 FCC Rcd 5675 (MB, rel. May 24, 2010); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 25 FCC Rcd 1805 (MB, rel. Feb. 22, 2010); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 24 FCC Rcd 12909 (MB, rel. Oct. 21, 2009); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 24 FCC Rcd 10616 (MB, rel. Aug. 10, 2009); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 24 FCC Rcd 8905 (MB, rel. June 29, 2009); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 24 FCC Rcd 7367 (MB, rel. May 29, 2009).

[8] *See* Comments of iClick2Media Inc./AlphaStar International Inc. ("AIR Comments"); FluteRadio LLC ("FluteRadio Comments"); Randolph J. May (President, Free State Foundation) ("Free State Comments"); Media Access Project ("MAP Comments"); Mosaic Communications Partners, LLC ("Mosaic Comments"); The Progress & Freedom Foundation ("PFF Comments"); Radio One, Inc. ("Radio One Comments"); RSS Network Corporation ("RSS Comments"); John Pavlica Jr. and Patrick Sharpless. *See also* Reply Comments of iClick2Media Inc./AlphaStar Inc. ("AIR Reply Comments"); Entravision Communications Corporation ("Entravision Reply Comments"); FluteRadio ("FluteRadio Reply Comments"); Hispanic Information and Telecommunications, Inc. ("HITN Reply Comments"); Metro Radio Korea Inc. ("Radio Korea Reply Comments"); RSS Network Corporation ("RSS Reply Comments"); and Sirius XM Radio Inc. ("Sirius XM Reply Comments"). Further, a number of interested parties made *ex parte* presentations regarding implementation details. *See* Letter from Jeneba Jalloh Ghatt, Counsel to iClick2Media, Inc. and AlphaStar International Inc., to Marlene H. Dortch, Secretary, FCC (Apr. 30, 2009) ("iClick2Media Apr. 30, 2009 *Ex Parte*"); Letter from Barry A. Friedman, Counsel to Entravision Communications Corporation, to Marlene H. Dortch, Secretary, FCC (May 5, 2009) ("Entravision May 5, 2009 *Ex Parte*"); Letter from Linda J. Vilardo, Vice President and Chief Administrative Officer, Radio One, Inc., to Marlene (continued....)

indicated that the Commission would address any additional timing issues in this implementation order.[9] After further extensions, the compliance deadline is presently November 21, 2010.[10]

7. We conclude that the details we adopt in this Order for implementing the Leasing Condition will encourage the prompt introduction of more diverse programming and program sources on each platform and are in the public interest.

II. DISCUSSION

A. Selection of Lessees

8. In this section, we set forth lessee eligibility criteria and selection criteria and processes that together are designed to promote source, viewpoint, and programming diversity on the Sirius and XM platforms expeditiously.

1. Qualified Entity Definition

9. In the *Sirius-XM Merger Order*, the Commission adopted a definition of Qualified Entity that "includes any 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."[11] In the *Public Notice*, we sought comment on whether the Commission should redefine "a Qualified Entity or Entities."[12] In response, the Progress and Freedom Foundation and Randolph J. May, President of the Free State Foundation, question the constitutionality of the Qualified Entity definition. These commenters state that the definition is race-conscious and, if challenged, would not withstand strict scrutiny under the Equal Protection Clause.[13] Thus, the Progress and Freedom Foundation urges the Commission to "make every effort" to ensure that the implementing rules "do not unconstitutionally favor particular racial or ethnic groups."[14] Other commenters, however, support the existing Qualified Entity definition and counter that it raises no constitutional concerns in part because it was a voluntary commitment by the Applicants.[15] Supporters of the *Sirius-XM Merger Order*'s Qualified Entity definition recommend retaining this definition and propose ways of refining the eligibility criteria.[16]

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H. Dortch, Secretary, FCC (May 5, 2009) ("Radio One May 5, 2009 *Ex Parte*"); Letter from Stephen D. Baruch, Counsel to RSS Network Corp., to Marlene H. Dortch, Secretary, FCC (May 15, 2009) ("RSS May 15, 2009 *Ex Parte*").

[9] *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 24 FCC Rcd 7367 (MB, rel. May 29, 2009).

[10] *See Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, DA 10-1558 (MB, rel. Aug. 19, 2010).

[11] *Sirius XM Merger Order*, 23 FCC Rcd 12409-10, ¶ 134, n.437 (quoting Applicants' June 13, 2008 Voluntary Commitment Letter at 2-3, n.2).

[12] *Public Notice*, 24 FCC Rcd at 2856, ¶ 3.

[13] *See, e.g.,* PFF Comments at 2-6; Free State Comments at 3-4. *See also* Letter from David Honig, President and Executive Director, Minority Media and Telecommunications Council ("MMTC"), to Marlene Dortch, Secretary, FCC at 2 (Dec. 10, 2009) (urging the Commission to hold that the original vote to approve the set aside in the *Merger Order* was premature because it was based on outdated *Adarand* studies and to encourage the company to work with historically Black colleges and universities, non-English speaking organizations, and tribal organizations while the Commission completes new *Adarand* studies). Because we are adopting a race-neutral definition for Qualified Entity, we decline to consider whether the vote was premature.

[14] PFF Comments at 1.

[15] *See, e.g.,* HITN Reply Comments at 3; RSS Comments at 4.

[16] *See, e.g.,* Entravision Reply Comments at 5 (encouraging the Commission to require that Qualified Entities have at least 25 percent of equity votes held by minorities or at least 25 percent of the Board of Directors comprised of (continued....)

10. We believe that it serves the public interest to introduce new and diverse program sources and programming on the SDARS platform as soon as possible, and the Commission relied on this important public interest benefit in granting the merger application. However, questions have been raised regarding the constitutionality of the definition of "Qualified Entity" as adopted in the *Sirius-XM Merger Order*.[17] To minimize the possibility of litigation regarding the constitutionality of the definition of a Qualified Entity, which could delay implementation of this important public interest benefit, we have decided to define "Qualified Entity" in this Order in a manner that is race-neutral.[18] In particular, we define Qualified Entity to require only that a lessee: (1) not be directly or indirectly owned, in whole or in part, by Sirius XM or any affiliate of Sirius XM; (2) not share any common officers, directors, or employees with Sirius XM or any affiliate of Sirius XM;[19] and (3) not have any existing relationships with Sirius XM for the supply of programming during the two years prior to the adoption date of this Order.[20]

11. We expect that this revised Qualified Entity definition will encourage new entry because programmers already carried on the Sirius XM platform are excluded. In addition, we believe that additional guidance will help focus Sirius XM's selection of lessees in a manner that will promote source, viewpoint, and programming diversity. We therefore provide below selection criteria and processes that, coupled with the modified definition of "Qualified Entity," are intended to advance these objectives.

2. Selection Processes and Criteria

12. The *Public Notice* sought comment on the process for selecting lessees if channel demand were to exceed supply.[21] Based on the record developed in response to the *Public Notice*,[22] we

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minorities); Radio One Comments at 2-3 (advocating a definition where Qualified Entities are required to have 51 percent or more of their equity votes held by minorities); RSS Comments at ii, 4-5.

[17] *See, e.g.*, PFF Comments at 2-6; Free State Comments at 3-4.

[18] For similar reasons, we decline the suggestion of some commenters that we define a Qualified Entity as a socially and economically disadvantaged small business concern ("SDB"), as defined under section 8(a) of the Small Business Act (15 U.S.C. § 637). *See* AIR Comments at 14-15; Mosaic Comments at 1; AIR Reply Comments at 2-3; FluteRadio Reply Comments at 1; *see also Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1160, 1164 (10th Cir. 2000) (subjecting application of the SDB definition to strict scrutiny). In addition, we decline to adopt a definition of a Qualified Entity as a small business. *See* Letter from David Honig, President and Executive Director, Minority Media and Telecommunications Council to Marlene Dortch, Secretary, FCC (Sept. 3, 2010). It is unclear what an appropriate definition of a small business would be in this context and we are concerned that any size category we choose might preclude the leasing of these channels to groups that might provide new sources of diverse programming. *See, e.g.*, Letter from Bruce Olcott, Squire, Sanders & Dempsey L.L.P, counsel to Howard University, to Marlene Dortch, Secretary, FCC, at 1 (June 4, 2009) ("Further, the Commission should ensure that the definition of Qualified Entity does not inadvertently exclude applicants that are fully capable and ready to provide original and diverse programming to minority audiences. For example, the SBA classification, without alteration, could exclude Howard University and its commercial radio station, WHUR, from participating in the application process."). Moreover, we conclude that the selection criteria set forth below will promote the leasing of these channels to small entities among others. *See infra* ¶ 18.

[19] We also expect that a Qualified Entity's officers or directors will not have any personal or family relationships with Sirius XM or Sirius XM's officers or directors during the two years prior to the adoption date of this Order.

[20] *See* Entravision Reply Comments at 4 (supporting programmer independence from Sirius XM). Future applicants can satisfy the definition of the Qualified Entity only if they do not have a prior contractual relationship with Sirius XM in the preceding two years (measured from date that Sirius XM announces that new applications will be accepted). We also clarify that an entity's relationship with Sirius XM as a lessee pursuant to the Leasing Condition will not be a bar to satisfying the Qualified Entity criteria for a subsequent lease.

[21] *Public Notice*, 24 FCC Rcd at 2856, ¶ 3.

[22] AIR Reply Comments at 4-5; Entravision Reply Comments at 6; Free State Comments at 5-6; Mosaic Comments at 2; PFF Comments at 5; and RSS Comments at 11.

conclude that allowing Sirius XM to select the lessees, subject to the limitations and criteria described herein, would best serve the public interest because it is an efficient way to select qualified lessees, ensures that the lessees selected will be technically compatible with the Sirius XM service, and will promote an increase in source, viewpoint, and programming diversity on the SDARS platform as soon as possible. We find that alternative selection proposals proposed in response to the *Public Notice* could cause unnecessary delay and uncertainty in implementing the voluntary commitment, which could thwart the Commission's goals of fostering diversity on the SDARS platform.

13. *Sirius XM Involvement.* Although the *Sirius-XM Merger Order* indicated that Sirius XM would not be involved in the selection of the Qualified Entities, we believe this decision could hinder the implementation of this Leasing Condition for the reasons explained below.[23] We sought comment on this issue in the *Public Notice*.[24] The record compiled in response to the *Public Notice* strongly supports allowing Sirius XM to participate in the process of selecting lessees.[25] Mosaic states that Sirius XM's involvement would help ensure the compatibility and suitability of the Qualified Entity for the satellite radio service,[26] and Entravision asserts that Sirius XM should be engaged in the selection process because the leasing and technical arrangements will necessarily involve it.[27] The Progress and Freedom Foundation suggests that excluding Sirius XM from the selection process may not be consistent with the First Amendment.[28] Sirius XM has expressed its willingness to participate in making the selections. Only Radio Korea opposes including Sirius XM in the selection process, arguing that the Commission should not permit Sirius XM to act as a "gatekeeper to leased channel access."[29]

14. We agree with the majority of commenters and find that there is a benefit to Sirius XM's involvement, and believe that our guidance addresses Radio Korea's concerns. We conclude that Sirius XM's involvement will facilitate the resolution of technical compatibility issues that might arise during the selection process, expedite the introduction of programming that adds to the diversity of offerings to consumers, and be more efficient than delegating such decision-making to a third party as some have suggested.[30] We expect Sirius XM to act in good faith to follow the guidelines we provide to ensure that the selection of lessees promotes diversity and set forth requirements below to ensure that the selection process is fair and transparent. If, in the future, it appears that Sirius XM seeks to use the selection and renewal process as a means to improperly influence the programming provided on the reserved channels, we may revisit our decision to permit Sirius XM to select lessees and take appropriate action.[31]

15. Our decision to allow Sirius XM to select among Qualified Entities is consistent with decisions regarding the selection of programmers for the Direct Broadcast Satellite ("DBS")

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[23] *Sirius-XM Merger Order*, 23 FCC Rcd at 12409-10, ¶ 134.

[24] *Public Notice*, 24 FCC Rcd at 2856, ¶ 3.

[25] AIR Reply Comments at 4-5; Entravision Reply Comments at 6; Free State Comments at 6; Mosaic Comments at 2; PFF Comments at 5; and RSS Comments at 11.

[26] Mosaic Comments at 2. *See also* RSS Comments at 14 (supporting creation of *ad hoc* panel that includes Sirius XM).

[27] Entravision states that Sirius XM should appoint a selection board if it does not want to be involved in the selection process. Entravision Reply Comments at 7.

[28] PFF Comments at 3.

[29] Radio Korea Reply Comments at 3.

[30] *See* AIR Comments at 5; Entravision Reply Comments at 6-7; Mosaic Comments at 2; and Radio Korea Reply Comments at 2.

[31] *See Implementation of Section 25 of the Cable Television and Consumer Protection Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, MM Docket 93-25, Report and Order, 13 FCC Rcd 23254, 23297, ¶ 102 (1998) ("*DBS PI Order*"). *See also infra* Section II.E.

noncommercial educational or informational programming ("NCE") set-aside and the NCE set-aside condition adopted in this proceeding.[32] In the DBS context, the Commission permits the DBS operator to select the programmers who use the NCE set-aside.[33] The Commission utilized the same approach in implementing the SDARS NCE set-aside condition in this proceeding.[34] We have received no complaints regarding Sirius XM's selection of programmers for the NCE set-aside and trust that Sirius XM will exercise good faith in selecting the lessees consistent with our guidance herein.

16. *Alternative Selection Proposals.* In response to the *Public Notice*, some commenters propose the creation of a panel or board to select the lessees.[35] In particular, Mosaic favors a panel that includes individuals with "media industry expertise,"[36] and AIR offers to act as an independent trustee and/or to create a board to select the programmers.[37] In contrast, FluteRadio calls these proposals "unwise" and compares them to a "beauty pageant" with "vague" and "unworkable" rules.[38] HITN states that setting up an advisory board or panel will only "delay the selection process, further prolonging the broadcast of radio programming targeted to minority and underrepresented populations."[39] We agree with HITN and find that the process of setting up an advisory board could cause significant delays and could introduce unnecessary uncertainty to the selection process. For that reason, we will not require Sirius XM to use an advisory board or selection panel to select lessees. We also decline AIR's request that it be selected to act as a third-party manager of the leased access channels.[40] As discussed above, we find that Sirius XM is better suited to manage the selection process itself. The selection and allocation criteria set forth herein will ensure that the process serves the Leasing Condition's goals.

17. Other selection proposals in the record do not include any opportunity for the evaluation of the strengths or weaknesses of potential lessees on an individual basis, could unnecessarily delay implementation of the condition, and/or would exclude Sirius XM from participating in the evaluation process. FluteRadio, for example, advocates a first-come/first-served system,[41] Radio One proposes a lottery system,[42] and HITN proposes that the Media Bureau select the lessees, in consultation with Sirius XM.[43] AIR opposes the first-come/first-served and lottery systems because, according to AIR, such proposals amount to no more than a "foot race" and would base important decisions that would affect

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[32] *Sirius-XM Merger Order*, 23 FCC Rcd at 12415, ¶ 145; *DBS PI Order*, 13 FCC Rcd 23301-02, ¶ 105.

[33] *DBS PI Order*, 13 FCC Rcd at 23298, ¶ 114.

[34] *Sirius-XM Merger Order*, 23 FCC Rcd at 12414, ¶ 143.

[35] AIR Comments at 3; Entravision Reply Comments at 6-7; Mosaic Comments at 2; Radio Korea Reply Comments at 2.

[36] Mosaic Comments at 2.

[37] AIR Comments at 15-18.

[38] FluteRadio Reply Comments at 1.

[39] HITN Reply Comments at 5.

[40] AIR Comments at 5; *see also* Letter from Malik Shakur, CEO, American Independent Radio, to Marlene H. Dortch, Secretary, FCC (Feb. 9, 2010); Letter from Jonathan Glass, Principal, Council Tree Investors, Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (Oct. 20, 2009) (recommending Mosaic Communications Partners, a tribally owned entity, to serve as a lessee who would in turn sublease channels to third parties). In implementing the DBS NCE set aside, we similarly declined to require that a third-party administer DBS NCE channels. *See DBS PI Order*, 13 FCC Rcd at 23299, ¶ 107 ("we see little advantage in simply transferring to a third party the power to select programmers – even if we could determine who that third party should be").

[41] FluteRadio Comments at 1-2.

[42] Radio One Comments at 5.

[43] HITN Reply Comments at 5.

programming on mere "luck."[44] RSS expresses concern that these methods could result in the selection of unqualified lessees,[45] and we agree. We find that Sirius XM, in accordance with the selection criteria provided in this Order, can more effectively and more quickly promote the public interest goal of making available to SDARS subscribers viable, diverse programmers and programming that will meet subscribers' needs and interests than a first-come/first-served procedure or lottery system that has no mechanism to evaluate the strengths or weaknesses of potential lessees, their programming proposals or how they will diversify Sirius XM's program offerings. Further, we think it unwise for the Commission to undertake the selection of lessees, as HITN proposes,[46] due to First Amendment and institutional concerns and we therefore will not direct the Media Bureau to do so.

18. Accordingly, we instruct Sirius XM to evaluate the pool of Qualified Entities and select as lessees those Qualified Entities that it believes, in good faith, will promote source, viewpoint, and programming diversity.[47] In evaluating the potential diversity contribution of prospective lessees, we intend that Sirius XM consider whether a potential lessee is a new entrant to the mass media industry. We would, for example, consider a source that already has access to a sizable base of listeners or viewers through other media outlets, such as broadcast stations, to promote source diversity less than one with more limited reach.[48] At the same time, we agree with RSS that "[l]easing channels to an unqualified or underqualified entity is ultimately unfair to the lessee, Sirius XM, and the listeners who pay for the radios and monthly service."[49] As a result, we recognize that Sirius XM will have to balance various considerations including, among other things, whether lessees (1) would provide a new source of programming and are new entrants in the mass media industry, (2) would offer a diverse viewpoint or diverse entertainment content, (3) would provide original content or programming of a type not otherwise available to Sirius XM subscribers, (4) would improve service to historically underserved audiences,[50] and (5) would, in Sirius XM's reasonable judgment, be able to meet its obligations and be able to deliver their proposed mix or type of programming for the duration of the lease term.[51] We believe that these

[44] AIR Reply Comments at 5.

[45] RSS Reply Comments at 3.

[46] *See* HITN Reply Comments at 5.

[47] "Programming diversity" refers to a variety of programming formats and content. Programming aimed at various minority and ethnic groups is an important component of program diversity for both television and radio. "Source diversity" refers to the availability of media content from a variety of content producers. "Viewpoint diversity" refers to the availability of media content reflecting a variety of perspectives. Source diversity can contribute to our goals of viewpoint diversity and program diversity. *See 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, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area*, MB Docket Nos. 02-277, 01-235, 01-317, 00-244, 03-130, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13627, 13623, 13633, ¶ 19, 36, 42, (2003), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004), *cert. denied*, 545 U.S. 1123 (2005).

[48] *But see* Radio Korea Reply Comments at 2, 4 (opposing limits on existing broadcasters) *and* our discussion *infra*. at ¶ 26.

[49] RSS Comments at 7.

[50] *See* Letter from Bruce A. Olcott, Partner, Squire, Sanders & Dempsey, L.L.P. (on behalf of Howard University), to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 18, 2009) ("Howard University *Ex Parte*").

[51] *See, e.g.*, Radio One Comments at 3 (arguing that it is critical that lessees have the resources to maintain the program service throughout the lease term); Entravision Reply Comments at 6; Mosaic Comments at 1; FluteRadio Comments at 1.

selection criteria, including the requirements that Sirius XM consider whether potential lessees would provide new and diverse programming, would be new entrants, or would serve historically underserved audiences, promote our objective that the leased channels be made available to programming sources that otherwise would not have an opportunity to provide programming to SDARS subscribers, including small entities and groups that are not traditional broadcasters.

19. As noted earlier, we expect that Sirius XM will use this selection process to create opportunities for a variety of programmers, including new entrants. Moreover, we encourage Sirius XM to consider whether a proposed lessee would offer new and diverse programming that would serve historically underserved audiences.[52]

20. We decline commenters' invitations to adopt specific procedural requirements for the application process. Even so, we recognize that some of the proposals in the record could be used by Sirius XM to facilitate its evaluation of potential lessees.[53] RSS, for example, proposes that potential lessees be required to submit letters, under sworn declarations, containing certain information, such as a demonstration that the entity meets the definition of Qualified Entity; a statement of the total number of channels the applicant is seeking to lease; for each channel requested, a description of the extent to which the applicant would air original programming; a statement of the number of hours of programming the applicant will commit to offer and the date by which it will meet that commitment; and a statement of whether the applicant will directly program the channel(s) it is requesting or will act as a broker or aggregator to third-party programmers.[54] We encourage Sirius XM to consider these proposals in establishing a process for lease applications.

21. *Transparent Selection Process.* We agree with AIR that the selection process should be fair and transparent.[55] We believe that a transparent selection process is in the public interest and is necessary to ensure that Sirius XM abides by the instructions and guidance we provide in this Order. AIR proposes several procedures that Sirius XM may want to consider in developing a fair and transparent application evaluation process.[56] Although we do not adopt AIR's specific proposals, we require Sirius XM to file with the Commission within 30 days of release of this Order a notification that identifies a public website or similarly accessible source where the following information relating to the application process will be available to the public: (1) the definition of Qualified Entity as provided herein;[57] (2) the deadline and procedures for submitting applications; (3) any specific information that it will require applicants to submit; and (4) any specific application criteria that Sirius XM intends to apply in its review of potential lessees.[58] Upon receipt of this information, the Commission will issue a public notice to inform the public about the location of this information. We require Sirius XM to make the described information available at the identified location within 35 days of the release of this Order. Sirius XM may implement the application and selection process in any manner it chooses as long as it follows the

[52] *See* Howard University *Ex Parte*, at 1-2.

[53] RSS Comments at 6.

[54] RSS Comments at 6. Regarding RSS's proposals to exclude brokers or aggregators, we prohibit the subleasing (including broker arrangements) and assignments of leased channel capacity in Section D, Implementation Guidance, *infra* ¶ 40, but this limitation does not prohibit lessees from acquiring programming from other sources.

[55] *See* AIR Comments at 11-12 (suggesting a public process).

[56] In particular, AIR proposes that the preliminary selection criteria for lessees be made available for public comment and that it would respond to public input and be prepared to accept potential lessees' applications within 60 days of making the selection criteria public. *See* AIR Comments at 11-12. *But see also supra* ¶ 16 (declining AIR's request to act as a third-party manager of the leased access channels).

[57] *See supra* ¶ 10.

[58] Sirius XM can require technical quality standards for programming carried on its service that applies to all programming, including that carried by Qualified Entities.

requirements set forth in this Order. The specific application criteria must be open to all entities that meet the definition of a Qualified Entity and cannot place limits on who can apply. Consistent with the Commission's goal of fostering diversity on the SDARS platform through this condition, however, Sirius XM may identify programming genres not currently offered to subscribers as additional guidance to potential lessees. In addition, as Sirius XM conducts the selection process, we require Sirius XM to post a list of all potential lessees and a list of those Qualified Entities that are selected as lessees. Such information must be updated as necessary and maintained at the identified location for the duration of the Leasing Condition.

22. As we did in implementing the SDARS NCE set-aside condition, we also require Sirius XM to maintain an electronic public file that includes information with respect to the process it uses to select the lessees.[59] The public file will promote transparency in the selection process and enable the public and the Commission to monitor Sirius XM's implementation of this Leasing Condition. Accordingly, Sirius XM must keep records similar to those required under the Commission's DBS NCE set-aside obligations.[60] Specifically, Sirius XM shall keep and make available for public inspection, at the identified location, a complete record of the following: (1) quarterly measurements of channel capacity and yearly average calculations on which it bases its four percent reservation, as well as its response to any capacity changes; (2) a record of entities to whom leased capacity is being provided, the amount of capacity being provided to each entity, and the terms under which it is being provided; and (3) a record of entities that have requested capacity, disposition of those requests, and reasons for the disposition. All records kept in this file shall be retained for a period of two years.

23. In order to ensure that any lessee selected by Sirius XM satisfies the criteria set forth in the definition of a Qualified Entity above, we require Sirius XM to notify the Media Bureau of its selections prior to signing an agreement for the leased channel or channels.[61] This process will provide the Commission with an opportunity to review each proposed lessee for compliance with the definition of a Qualified Entity before Sirius XM engages in the negotiations for a long-term lease or agreement, and it does not impose a significant burden or delay in the implementation of the Leasing Condition. Sirius XM must provide the name of each lessee it has selected and certify that, to the best of its information and belief, the entity meets the definition of a Qualified Entity as provided herein.[62] The Media Bureau will have 45 days to respond to the selection of proposed lessees submitted by Sirius XM for our review. If the Bureau does not respond within 45 days, Sirius XM's proposed lessee will be deemed to be in compliance with the definition of a Qualified Entity in accordance with this Order. Thereafter, Sirius XM may sign an agreement for the leased channel or channels. We do not intend to second-guess Sirius XM's good faith selection of one lessee over another applicant where we agree that the selected lessee meets the definition of a Qualified Entity and Sirius XM followed the transparent selection process and capacity allocation requirements set forth in this Order.

24. *No Editorial Control.* In the *Sirius XM Merger Order*, the Commission concluded that Sirius XM would "have no editorial control over these channels."[63] Consistent with our decision regarding the implementation of the DBS NCE set-aside and the SDARS NCE set-aside condition, we find that allowing Sirius XM to select third-party lessees does not constitute editorial control.[64] In

[59] *See Sirius-XM Merger Order*, 23 FCC Rcd at 12415, ¶ 146.

[60] *See DBS PI Order,* 13 FCC Rcd at 23301, ¶ 114; 47 C.F.R. § 25.701(f)(6).

[61] In this Order, we delegate authority to the Media Bureau staff to review Sirius XM's selection of lessees.

[62] *See supra* ¶ 10.

[63] *Sirius-XM Merger Order*, 23 FCC Rcd at 12409-10, ¶ 134.

[64] *Sirius-XM Merger Order*, 23 FCC Rcd at 12415, ¶ 145; *DBS PI Order*, 13 FCC Rcd at 23301-02, ¶ 114. The SDARS NCE set-aside was modeled on the DBS set-aside and followed similar policy goals. *Sirius-XM Merger Order*, 23 FCC Rcd at 12413-14, ¶¶ 140, 142.

adopting the DBS rules, the Commission found that permitting the DBS operator to select among qualified programmers did not constitute editorial control.[65] As in the DBS context, we conclude that Sirius XM may permissibly consider a variety of factors in deciding which programmers to select, such as whether an applicant is a new entrant, would offer diverse or original content, and/or is commercially viable.[66] As with the DBS set-aside, however,[67] Sirius XM may not require the programmers it selects to include particular programs or material on their channels as a condition of carriage, or alter, censor, or otherwise exercise any control over the programming.[68] We also conclude that a narrow interpretation of the no editorial control prohibition to allow Sirius XM to select third-party lessees will encourage the production of high-quality programming while remaining sensitive to the First Amendment rights of both Sirius XM and the Qualified Entities providing content.[69]

B. Capacity Allocation

25. The *Public Notice* sought comment on whether there should be a single lessee or multiple lessees, how capacity should be allocated among lessees, and technical matters relevant to capacity allocation.[70] We believe that it is appropriate to give Sirius XM direction on capacity allocation to promote our diversity objective. Specifically, Sirius XM has discretion to allocate capacity among the lessees, provided that: (1) no more than one-half of the total channels set aside for this condition are allotted to full-power broadcast licensees, including entities and individuals with an attributable interest in any such licensee; and (2) no more than four of the channels set aside for this condition (i.e., two channels simulcast on both Sirius and XM, two channels on Sirius and two channels on XM (not simulcast), or four channels on one platform) are allotted to any single lessee, including any entity with an attributable interest in the lessee.[71]

26. First, we agree with RSS "that entities that are new to the radio market will bring fresh voices and perspectives that are truly diverse and will increase the number of radio programmers thereby creating more competition."[72] To accomplish this goal, RSS proposes that potential lessees' principals

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[65] *See DBS PI Order*, 13 FCC Rcd at 23296, ¶ 100.

[66] *See supra* ¶ 18 (discussing potential selection criteria).

[67] Our decision to interpret the "no editorial control" requirement narrowly is consistent with our decision in the DBS NCE context. *See DBS PI Order,* 13 FCC Rcd at 23305, ¶ 123 (interpreting the statutory requirement that DBS operators "not exercise any editorial control" over the NCE programming narrowly to be consistent with First Amendment).

[68] *See DBS PI Order*, 13 FCC Rcd at 23297, ¶ 102. In order to further the goal of providing diverse and original content on the leased channels, Sirius XM in its discretion may ask programmers to identify and adhere to particular programming formats or genres or to seek to serve target audiences that share certain interests or demographic characteristics. Descriptions of such formats, genres, or target audiences may be offered by applicants for the leased channels and may include non-binding examples of illustrative programming, but Sirius XM may not require applicants to provide such examples as a condition for consideration or selection for carriage on the leased channels.

Moreover, we expect lessees to cooperate with Sirius XM on any emergency and public safety alert information and programming. In addition, this prohibition does not prevent Sirius XM from removing programming from its service that violates the law.

[69] *DBS PI Order*, 13 FCC Rcd at 23299, ¶ 107.

[70] *Public Notice*, 24 FCC Rcd at 2856, ¶ 3.

[71] *See* 47 C.F.R. § 73.3555 (notes) (setting forth our broadcast attribution standard). These attribution rules will be applied to all lessees, even if they are not broadcasters. Although the Applicants noted in their voluntary commitment that twelve channels would equal four percent of their full-time audio channels on both the Sirius and XM platforms, we expect the capacity allocated to the Leasing Condition to increase over time as Sirius XM's overall channel capacity increases. *See Sirius-XM Merger Order*, 23 FCC Rcd at 12434-35, App. B.

[72] RSS Comments at 7, n.8.

(defined to include officers, directors, 10 percent or greater equity owners, partners, etc.) may not "own or control a 10% or greater interest in any entity that holds a broadcast radio or television station license."[73] We find it unnecessary and undesirable to create an absolute bar on full-power broadcast licensees' participation. Some full-power broadcast licensees may be able to offer programming that increases the diversity of Sirius XM's offerings, serves the needs and interests of Sirius XM's subscribers and potential new subscribers, and may not otherwise be available to most SDARS subscribers.[74] In addition, existing full-power broadcast licensees are likely to have a ready source of programming or the expertise and means to produce new programming.

27. On the other hand, we find it appropriate to limit the capacity allocated to existing full-power broadcast licensees meeting the definition of a Qualified Entity to ensure that existing full-power broadcast licensees do not use all of the leased capacity.[75] We intend that the Leasing Condition be a means of introducing new and diverse sources, viewpoints and programming to SDARS subscribers. Accordingly, we limit the capacity that Sirius XM may allocate to a full-power broadcast licensee, including any entity or individual with an attributable interest in any such licensee, as defined by our broadcast attribution rules (collectively "full-power broadcast licensees").[76] Sirius XM may allocate to full-power broadcast licensees no more than one half of the total capacity required to be set aside under the condition.[77] We believe that this approach will afford a sufficient opportunity for full-power broadcast licensees and other entities to become lessees if Sirius XM believes that selecting such entities would further the Commission's diversity goals. As we stated above, we expect that broadcast and non-broadcast programmers can contribute to source, viewpoint and program diversity, although not necessarily in equal measure. It is for Sirius XM to weigh, consider and determine the financial viability of the potential lessees, other technical qualifications, as well as the combination of programming sources and content that will contribute substantially to its current programming line-up by addressing unserved and underserved needs. However, we do not intend for this guideline to function as a set-aside for full-power broadcast licensees, and Sirius XM need not allocate any capacity to full-power broadcast licensees if it determines that accomplishing the diversity goals of the Leasing Condition can best be done by leasing the capacity to entities that are not full-power broadcast licensees.

28. Second, we limit the number of channels that Sirius XM may allocate to any single lessee to four channels (i.e., two channels simulcast on Sirius and XM, two channels on each Sirius and XM platform (not-simulcast), or four channels on one platform). For purposes of this limitation, a single lessee includes all entities and individuals with an attributable interest in such lessee as measured by our broadcast attribution rules.[78] We reach this conclusion after considering a variety of proposals for

[73] RSS Comments at 6. Radio Korea, however, opposes any approach that "disfavors existing radio programming providers" and submits that existing providers "should be viewed favorably for their experience, qualification and established track record of success as programmers." Radio Korea Reply Comments at 2, 4.

[74] Conversely, broadcast entities whose stations number in the hundreds and are available over-the-air in most major U.S. cities may reasonably be expected to contribute less to source, viewpoint, and program diversity.

[75] *See supra* ¶ 10. This limitation does not apply to low-power broadcast licensees.

[76] *See supra* n.69.

[77] This limitation is a cap on the total number of channels available to all full-power broadcast licensees and those with an attributable interest in any licensee, as defined by 47 C.F.R. § 73.3555 and accompanying notes. The total number of channels allocated to all full-power broadcast licensees, or those with an attributable interest in such a licensee, may not exceed one-half of the total capacity set aside for this Leasing Condition (or six of the 12 channels currently contemplated for the set-aside).

[78] *See* 47 C.F.R. § 73.3555 and accompanying notes. The broadcast attribution rules will apply to all entities for purposes of this condition, even if such rules would not apply to such entities in the normal course. Thus, the lessee and all entities and individuals with an attributable interest in such lessee together may receive up to one half of the channel capacity.

allocating capacity, ranging from giving all the capacity to a single entity to allocating no more than one channel per lessee. RSS and Radio Korea, for example, urge the Commission to consider leasing multiple channels to a single entity.[79] Radio One proposes that the Commission allocate three simulcast "Super Channels"[80] to established broadcasters (that do not currently have programming on Sirius XM),[81] and that the remaining six (non-simulcast) channels be allocated to "smaller programmers" that "may not necessarily be required to provide 24/7 programming," but that could provide programming in 4-hour blocks.[82] Mosaic urges the Commission to permit each Qualified Entity to receive "up to six channels."[83] Finally, HITN advocates limiting each Qualified Entity to a single channel.[84] Although we decline to adopt any of these specific proposals, we conclude that it is appropriate to limit the number of channels allotted per lessee to no more than four of the total set-aside channels, as set forth below.[85]

29. We believe that limiting each lessee to no more than four channels will further two important goals. First, the limitation will ensure a multiplicity of Qualified Entities providing diverse programming and that SDARS leased channel capacity will not be dominated by a single programmer. As we found in adopting the DBS NCE set-aside and SDARS NCE set-aside condition, a limitation on the number of channels any single programmer may use will provide an opportunity for the carriage of programming that might not otherwise be available, including programming targeting traditionally underserved audiences.[86] Second, the limitation is sufficiently generous that it will permit a lessee to

[79] RSS Comments at 7; Radio Korea Reply Comments at 2. In particular, RSS suggests that a single entity seeking multiple channels could be in a "superior position" with respect to some criteria "as compared with other entities seeking only one channel," and that "leasing multiple channels to the superior entity would advance the public interest goals behind the [Leasing Condition] far more than reducing the number of channels the superior entity is entitled to lease in order to achieve the appearance of fairness." RSS Comments at 7.

[80] The "Super Channels" would consist of three channels on Sirius and three channels on XM, broadcasting the same programming 24/7, for a total of six channels. *See* Radio One Comments at 2.

[81] *See* Radio One Comments at 3. Other commenters similarly mention the possibility of simulcasting programming on both the Sirius and XM platforms. *See* Entravision Reply Comments at 2-3. *But see* RSS Reply Comments at 4 (opposing Radio One's simulcast proposal).

[82] Radio One Comments at 4-5. According to Radio One, each such programmer could be allowed four hours for its content. *Id.* Entravision generally supports Radio One's implementation plan, but it advocates that Qualified Entities have at least 25 percent of equity votes held by minorities or at least 25 percent of the Board of Directors comprised of minorities, combined with a requirement that the Qualified Entity demonstrate a "clear, consistent and longstanding record of serving minority communities through the media." Entravision Reply Comments at 2-5.

[83] Mosaic Comments at 2.

[84] HITN Comments at 6.

[85] We decline to adopt the scheme advanced by RSS whereby capacity would be allocated based on the "relative size of the minority group in the general population" and that "entities with the greatest percentage of minority ownership" would be granted preference. RSS Comments at 4-5. As explained in our discussion above, we redefine Qualified Entity in a race-neutral manner. *See supra* ¶ 10.

[86] *See DBS PI Order*, 13 FCC Rcd at 23302, ¶ 116; *see also Sirius-XM Merger Order*, 23 FCC Rcd at 12414, ¶ 143. We note that the DBS NCE rules and the SDARS NCE set-aside condition include a limitation of one channel per programmer unless there is excess capacity. We believe that a limitation of four channels per lessee unless there is excess capacity, is appropriate here because (1) there is interest in the record for simulcasting (i.e., broadcasting the same programming on the legacy Sirius and XM platforms), and (2) unlike the NCE set-aside, which was allocated for noncommercial entities, these channels may be used by commercial entities, and we believe this limit should enable the lessee to attract a wider audience and bring subscribers to SDARS. *See, e.g.,* Mosaic Comments at 2 (urging the Commission to allocate up to six channels per lessee to "generate interest from capital sources and programming sponsors"). As in the NCE SDARS set-aside provisions, after all Qualified Entities seeking access to reserved channels have been offered carriage, Sirius XM may allocate an additional channel to a lessee without having to make further efforts to find other Qualified Entities to fill the channels reserved for the leasing condition.

acquire enough channels to accommodate business plans dependent on programming more than a single channel and allow a single lessee to provide a variety of high-quality, diverse programming that is not otherwise available to SDARS subscribers and may attract new subscribers and enhance the commercial viability of SDARS. Sirius XM may also elect to lease a single channel to more than one lessee, thereby increasing the number of distinct voices, as some commenters suggest.[87] Under this approach, Sirius XM may utilize a share-time approach and divide a 24-hour programming day on a single channel into sub-parts to be leased separately. We do not require Sirius XM to sub-divide all or any of the set-aside channels in this manner because doing so may constrict the ability of some programmers to provide financially viable content around-the-clock. However, Sirius XM should have the flexibility necessary to offer different leasing arrangements to various entities based on the lessees' programming proposals.

30. The guidelines in this Order are designed to ensure that all capacity set aside for this Leasing Condition will be utilized by Qualified Entities, in a manner that will achieve the objectives of the Leasing Condition. It may occur, however, that at some point in time, the supply of leased channels is greater than the demand for them. In that situation, Sirius XM may allot more than four channels to a single entity, provided that the lease term for the excess channel(s) may not exceed three years.[88] Our approach here is consistent with the Commission's DBS NCE set-aside rules that allow for one channel per programmer unless the supply of channels exceeds demand.[89] Further, where Sirius XM allots more than four channels to a single entity because the supply of leased channels is greater than the demand, at the end of the initial term applicable to the lease of the excess channel(s), to encourage new entry, Sirius XM must make that excess channel capacity available to Qualified Entities that are not existing lessees rather than renewing the lease for the excess channel(s). Sirius must make available on a website, or a similarly accessible source, an announcement that new capacity is available and the timeframe for accepting new applications. Sirius XM must follow the same process as that set forth in this Order to fill that capacity, including transparency requirements.

C. Capacity Calculation

31. The *Public Notice* sought comment on the technical aspects of calculating the capacity allocated to lessees, including whether the capacity should be allocated to lessees by bit rate, bandwidth, or channels.[90] In response, commenters generally characterize the leased capacity in terms of "channels."[91] In its voluntary commitment, Sirius XM agreed to lease capacity on a per-channel basis, and we adopted a per-channel approach for Sirius XM's noncommercial educational and informational programming set-aside. We have received no evidence to suggest that this approach is not technologically sound or is otherwise flawed, and we believe that adopting a consistent approach for both set-asides will be administratively efficient.

32. The methodology used for calculating Sirius XM's noncommercial educational or informational programming set-aside condition is adapted from the DBS set-aside methodology set forth in section 25.701(f)(1) of the Commission's rules.[92] Following this approach, we direct Sirius XM to

[87] AIR Comments at 13; Radio One Comments at 4.

[88] This limitation is in contrast to the minimum lease term of five years we adopt for lessees not exceeding this channel allocation cap. *See infra* ¶ 38.

[89] *See* 47 C.F.R. § 25.701(f)(4).

[90] *See Public Notice*, 24 FCC Rcd at 2856, ¶ 3 and n.11

[91] *See, e.g.,* AIR Comments at 13; Mosaic Comments at 2; and RSS Comments at 1-6. *But see* FluteRadio Comments at 2 (suggesting that the aggregate capacity provided to lessees must total four percent of the bandwidth on the Sirius and XM platforms).

[92] *See Sirius-XM Merger Order*, 23 FCC Rcd at 12414-15, ¶ 144; 47 C.F.R. § 25.701(f)(1).

reserve four percent of its full-time[93] audio channel capacity exclusively for use by Qualified Entities.[94] The number of audio channels shall be determined annually by calculating, based on measurements taken on a quarterly basis, the average number of channels available for audio programming during the previous year. In the *Sirius-XM Merger Order*, the Commission noted that the number of reserved channels for the noncommercial educational or informational set-aside must be based on total system capacity and not on the number of channels in any particular service package.[95] We recognize that there are many SDARS receivers in the field that can receive only signals from the legacy Sirius platform or from the legacy XM platform. For this reason, the capacity calculation for the leased capacity set aside should be calculated on a platform basis. Accordingly, Sirius XM must make available four percent of the total capacity of the legacy XM platform and four percent of the legacy Sirius platform, and the capacity calculation must be performed separately for each platform.

33. We note that Sirius XM voluntarily committed "that in no event will the combined company reserve fewer than six channels on the Sirius platform and six channels on the XM platform" for the leased capacity set-aside.[96] We reaffirm this requirement that the leased capacity set-aside shall be at a minimum six channels on the Sirius platform and six channels on the XM platform, and may in the future comprise additional channels as Sirius XM implements advanced signal compression techniques.

D. Implementation Details

34. After Sirius XM selects the lessees, Sirius XM and the lessees must negotiate individual leases in good faith consistent with the direction and guidance provided in this Order. In this section, we provide guidance on the terms and conditions of such agreements.

35. *Availability of Channels to Subscribers.* As in the DBS NCE set-aside and the SDARS NCE set-aside contexts, we require that the leased channels be made available "to all subscribers at no additional charge."[97] DBS operators make NCE channels "available" by including the channels on every tier or programming package at no additional charge. Consistent with this approach, we require that the leased channels be part of every compatible package or tier[98] provided to Sirius XM subscribers, to the extent technically feasible, including Internet subscribers as AIR suggests,[99] and that Sirius XM not assess an additional charge for the receipt of these channels. For example, Sirius XM must provide to a la carte subscribers all of the leased channels in addition to the 50 or 100 channels they may choose at the a la carte package price, and Sirius XM may not charge extra for the leased channels.[100] Thus, under the

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[93] "Full-time audio channels" means the aggregate number of channels of music, news, sports, entertainment or other audio programming broadcast on a continuous basis, 24 hours a day, seven days a week, plus part-time channels aggregated on a full-time equivalent basis, on the Sirius platform or the XM platform, as the case may be.

[94] As with the SDARS NCE set-aside condition, Sirius XM may use this reserved capacity until such time as it is used by lessees, but cannot enter into any contracts that would interfere with its compliance with this Leasing Condition. *Sirius-XM Merger Order*, 23 FCC Rcd at 12414, ¶ 144.

[95] *See id.*

[96] *See id.* at 12410, ¶ 134.

[97] *See id.* at 12414-15, ¶ 144 (citing *DBS PI Order*, 13 FCC Rcd at 23285, ¶ 74). *See also American Distance Education Consortium,* Declaratory Ruling and Order, 14 FCC Rcd 19976 (1999) (ruling that reserved DBS channels must be made available to subscribers in all parts of the country).

[98] Sirius XM may exclude a leased channel from a package or tier if the leased channel is not compatible with the package or tier. For example, a leased channel that provides only music programming would not have to be carried on a News, Sports & Talk package, which currently does not carry music channels.

[99] Letter from Jeneba Jalloh Ghatt, Counsel to AIR, to Marlene H. Dortch, Secretary, FCC, at 3 (Apr. 30, 2009) ("AIR Apr. 30, 2009 *Ex Parte*").

[100] The Sirius XM a la carte offerings currently allow subscribers to select 50 channels a month for $6.99 or 100 channels for $14.99 per month. A la carte subscribers can purchase additional non-premium channels for 25 cents (continued....)

current a la carte plans, 50-channel a la carte subscribers will receive the leased channels plus 50 a la carte channels for $6.99, and the 100-channel a la carte subscribers will receive the leased channels plus 100 a la carte channels for $14.99. We believe that this measure is necessary to ensure that the leased channels reach all subscribers, and it is consistent with the requirements for NCE programming in the DBS context.[101]

36. Some commenters urge the Commission to require that Sirius XM include the leased channels in Sirius XM's programming guides to ensure that Sirius XM customers are able to locate leased access programming.[102] We agree and conclude that doing so will help the lessees attract subscribers, which could be an important factor in a lessee's viability. Given that Sirius XM already includes existing channels and programming in such guides, we believe that the burden on Sirius XM is minimal.[103] Thus, we require Sirius XM to include the leased channels in the programming guides for any programming package that includes such channels. As in the DBS set-aside and SDARS NCE set-aside condition,[104] we also require that Sirius XM offer to lessees discrete channels that remain at a specified channel location on a 24/7 basis, i.e., the lessee must be assigned a specific channel position that cannot be shifted to a different location on different days or times.[105]

37. We decline to adopt the suggestion of AIR and FluteRadio that the Commission require Sirius XM to make the leased channels available free-of-charge to anyone who has an SDARS receiver or a mobile device that can receive Sirius XM streaming audio, regardless of whether the listener is a Sirius XM subscriber.[106] Sirius XM opposes such proposals.[107] Although Sirius XM and the lessees are free to negotiate delivery of these channels to subscribers who do not have a subscription, we will not compel Sirius XM to do so. We find that requiring Sirius XM to offer its leased access channels without a subscription would unduly interfere with its existing business plan.

(Continued from previous page)
each per month. *See Sirius-XM Merger Order*, 23 FCC Rcd at 12387, 12433-34, ¶ 85, App. B. Under their current a la carte plan, Sirius XM may not charge subscribers 25 cents per month for any of the leased channels, and the leased channels may not count toward the 50- or 100-channel maximum eligible for the $6.99 or $14.99 flat fees. In general, we prohibit Sirius XM from charging additional fees for the leased channels in any programming package they may offer.

[101] For purposes of compliance with the SDARS NCE set-aside condition, we clarify that Sirius XM must provide the NCE set-aside channels as part of every programming package or tier, including its a la carte packages as set forth above. *See* 47 C.F.R. § 1.2.

[102] FluteRadio Comments at 2; RSS Comments at 12.

[103] We decline, however, to adopt RSS's proposal to require Sirius XM to "include the leased channels in all future promotional materials." *See* RSS Comments at 12. Although the promotion and availability of the leased channels may attract new subscribers to SDARS service, we believe this issue is best handled privately by Sirius XM and its respective lessees.

[104] *See* 47 C.F.R. § 25.701(f)(5)(iv); *DBS PI Order*, 13 FCC Rcd at 23282, ¶ 68; *Sirius-XM Merger Order*, 23 FCC Rcd at 12415, ¶ 146.

[105] This requirement does not preclude Sirius XM's ability, in the ordinary course of business, to reposition leased channels in a manner consistent with the repositioning of other channels. Additionally, Sirius XM and the lessee may mutually agree to move channel locations and our guidance here should not be a bar to such outcome.

[106] AIR Comments at 11; FluteRadio Comments at 2.

[107] *See* Sirius XM Reply Comments at 2. We disagree with Sirius XM that the Commission specifically rejected this suggestion in the *Sirius-XM Merger Order*. *See* Sirius XM Reply Comments at 2 (citing *Sirius-XM Merger Order*, 23 FCC Rcd at 12408, ¶ 132). In the *Sirius XM Merger Order*, the Commission rejected a single entity's proposal for allocation and implementation of leased capacity. The fact that the proposal contemplated that the leased capacity would be available without a subscription was not the basis of the Commission's decision to reject the proposal. *See Sirius-XM Merger Order*, 23 FCC Rcd at 12408-11, ¶¶ 132-135.

38. *Lease Term.* In its voluntary commitment, Sirius XM agreed to enter into "long term" leases with Qualified Entities.[108] In the *Public Notice*, we sought comment on the appropriate duration of the "long-term" lease.[109] We agree with HITN that setting a minimum lease term is appropriate and necessary to attract financially viable lessees.[110] Entravision, HITN, and Radio One suggest that we impose a minimum lease term of at least five years for simulcast channels (i.e., broadcasting the same programming on the legacy Sirius and XM platforms),[111] and Radio Korea and RSS propose a fixed ten-year term.[112] AIR recommends a two- or three-year lease term.[113] We conclude that leases should have terms that are no less than five years. We find persuasive Entravision, Radio One, and HITN's contention that a five-year lease term would better promote diversity and competition by encouraging the continued production of high-quality programming consistent with the goals of the Leasing Condition.[114] We conclude that a minimum five-year lease term is supported by the record, and provides a reasonable level of certainty for programmers investing in the creation of quality content for SDARS. Sirius XM and the lessees may negotiate longer terms if both parties believe it is appropriate to do so.[115]

39. We decline to adopt the suggestion advanced by AIR, FluteRadio, and Mosaic that we adopt a lease term that is coterminous with the SDARS licenses.[116] Sirius XM, through its wholly owned subsidiaries, holds licenses to operate several satellites, each individually licensed by the Commission and each with a distinct license expiration date.[117] The licenses for Sirius's and XM's in-orbit satellites contain a total of five different expiration dates.[118] Because there is no single definite expiration date for the various SDARS satellite licenses, we conclude that tying the lease term to an SDARS license would be unnecessarily complicated and that a minimum term avoids such confusion.

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[108] *Sirius-XM Merger Order*, 23 FCC Rcd at 12409-10, ¶ 134.

[109] *Public Notice*, 24 FCC Rcd at 2856, ¶ 3.

[110] HITN Reply Comments at 6. HITN states that the absence of a minimum lease term would deprive programmers of the "necessary assurances to invest in and produce quality programming." *Id.*

[111] Entravision Reply Comments at 4 (suggesting a minimum five-year term); HITN Reply Comments at 6 (suggesting a minimum five-year term); Radio One Comments at 3-4 (suggesting a minimum two or five-year lease term, depending on type of programmer).

[112] Radio Korea Reply Comments at 2; RSS Comments at 12.

[113] AIR Comments at 12 (AIR suggests a 2-3 year lease term for "independent program suppliers" and a lease term coterminous with the SDARS licenses for itself).

[114] Entravision Reply Comments at 4; Radio One Comments at 3; HITN Reply Comments at 5-6.

[115] When the initial lease term expires and the lease is not renewed, the lease is terminated for cause, or capacity otherwise becomes available, we require Sirius XM to follow the same process to lease capacity as set forth herein, including the transparency requirements.

[116] AIR Comments at 12; FluteRadio Comments at 2; Mosaic Comments at 2.

[117] XM operates its system using two active satellites in geostationary orbit, while Sirius uses three satellites in a highly inclined, elliptical non-geostationary orbit. *See Sirius-XM Merger Order*, 23 FCC Rcd at 12360, ¶ 24. The license term for each satellite is eight years, commencing when the satellite is launched and put into operation. *See* 47 C.F.R. § 25.144(d). Because the launch and operation date varies from satellite to satellite, the license expiration dates for the satellites also vary.

[118] *See* IBFS File No. SAT-MOD-20090217-00024 (extending license term of XM-1, Call Sign: S2118, until May 31, 2014); IBFS File No. SAT-MOD- 20081029-00211 (extending license term of XM-2, Call Sign: S2119, until March 31, 2014); IBFS File No. SAT-RPL-20040212-00019 (license term of XM-3, Call Sign: S2617, until April 20, 2013); IBFS File No. SAT–RPL–20040212–00018 (license term of XM-4, Call Sign: S2616, until December 15, 2014); IBFS File No. SAT-MOD-19981211-00099 (license term of Sirius-1, -2, & -3, Call Sign S2105, until February 11, 2010). The number of licenses does not include pending applications or satellites that have been authorized, but yet to be launched and put into operation.

40. *Subleasing and Assignments.* RSS urges the Commission to prohibit subleasing or assignments of the leased channels to ensure that the selected programmers are capable of airing original content and that the Commission's goals of promoting diversity are realized.[119] We agree with RSS and prohibit such arrangements unless Sirius XM expressly agrees to the specific sublease or assignment and unless the sublessee or assignee is another Qualified Entity.[120] Subleasing or assignments (including the brokering of capacity) of the leased channels would put the capacity allocation decision in the hands of individual lessees and could undermine our goals of promoting new entry and limiting the capacity allocated to any single entity, including full-power broadcast licensees.[121]

41. *Indemnification.* AIR, Entravision, and Radio One assert that Sirius XM should be indemnified for its implementation of the Leasing Condition.[122] We agree and conclude that Sirius XM should be permitted to require lessees to indemnify Sirius XM against liability arising from their conduct as lessees.[123] We believe that private negotiation is the best means to implement the indemnification requirement in this context and therefore decline to adopt specific conditions or limits regarding the type of contractual indemnification agreement or the amount of coverage or the type of insurance policy that Sirius XM may require. Consistent with our approach in cable leased access, however, we will require that insurance and indemnification requirements be reasonable in relation to the equitable objective of limiting the liability of Sirius XM for conduct of lessees over which it will have little or no control.[124]

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[119] *See* RSS Comments at 10.

[120] In addition, a transfer of control of the lessee to a non-Qualified Entity during the lease term will void the lease contract.

[121] Our prohibition on subleasing and assignments does not preclude a lessee from acquiring programming from another source.

[122] AIR states that the process of implementing the Leasing Condition would be more efficient if Sirius XM were not responsible for the content that is carried on the leased channels. *See* AIR Reply Comments at 6. Entravision asserts that indemnification of Sirius XM is necessary to ensure that only well-qualified parties are able to lease the channels and "promptly establish successful and sustainable third-party SDARS operations." Entravision Reply Comments at 6. Radio One asserts that as a condition of eligibility, applicants for leased channels "should be willing and able to indemnify Sirius XM from any liability arising from lapses in compliance, including without limitation, claims relating to the applicants' programming content." Radio One Comments at 2. *See also* RSS Comments at 11.

[123] As the licensee, Sirius XM remains ultimately responsible for all content broadcast on its service. Although some commenters have suggested we apply our broadcast indecency rules to SDARS, *see, e.g.*, AIR Comments at 11, these rules do not apply to satellite-delivered subscription programming and we see no basis here upon which to alter their scope. *See also* Letter from W. Kenneth Ferree, Chief, Media Bureau, to Saul Levine, Mt. Wilson FM Broadcasters, Inc., 19 FCC Rcd 24069 (MB, rel. Dec. 15, 2004) (declining to grant a petition for rulemaking to amend SDARS rules to include an indecency provision analogous to that found in Section 73.3999 of the Commission's rules).

[124] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Commercial Leased Access*, CS Docket No. 96-60, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267, 5323, ¶ 112 (1997) ("*1997 Cable Leased Access Order*"). The Commission finds that reasonable insurance requirements should be based on Sirius XM's practices with respect to insurance requirements imposed on non-leased access programmers, the likelihood that the nature of the programming will pose a liability risk for the operator, previous instances of litigation arising from the leased capacity, and any other relevant factors. *See Leased Commercial Access*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909, 2922-23 ¶ 27 (2008) (order stayed, *United Church of Christ, et al.* v. *FCC*, No. 08-3245 (6th Cir. filed May 22, 2008)) (*citing 1997 Cable Leased Access Order*, 12 FCC Rcd at 5323, ¶ 112); *see also United Productions* v. *Mediacom Communications Corporation*, CSR 6336-L, Order, 22 FCC Rcd 1224 (rel. Jan. 29, 2007) (finding unreasonable insurance requirement in cable leased access).

42. *Advertising.* At least one commenter has indicated that the success of lessees may depend, at least in part, on advertising revenue.[125] We find it reasonable for lessees to include advertising on their channels as a means of support for their programming. As a result, we conclude that it would be inappropriate for Sirius XM to prevent lessees from airing a reasonable amount of advertising on the leased channels.[126] At the same time, consistent with the purposes of the Leasing Condition, Sirius XM may not require lessees to provide advertising time to Sirius XM on the leased channels, other than cross-promotions among Sirius XM channels in the normal course of the company's business.[127]

43. *Other Terms and Conditions.* We believe that it serves the public interest to defer additional details of the lease terms to negotiations between Sirius XM and its lessees. With respect to these additional details, we trust that individualized negotiations, which can take into account the interests of individual lessees, will be more efficient than a one-size-fits-all solution. As a result, we decline to establish other implementation rules or guidelines at this time. Thus, we do not dictate a specific timeline for the airing of programming as some commenters suggest.[128] Lessees' situations will vary and the parties are best left to negotiate timeframes that are reasonable based on individual circumstances.[129] We expect that Sirius XM may require that leasing agreements contain customary terms, fees, and conditions consistent with those included in other programming contracts and agreements. Finally, consistent with the Applicants' voluntary commitment as adopted in the *Sirius-XM Merger Order*, we reiterate that the Qualified Entities will not be required to make any lease payments for their channel allotments.[130]

E. Enforcement

44. To ensure that Sirius XM complies with the Leasing Condition and the implementation details provided in this Order, we adopt enforcement procedures that we conclude are appropriate for SDARS and specifically for compliance with this condition. A few commenters suggest that the

[125] *See* AIR Comments at 13 (stating that content producers would need to generate advertising revenue); Entravision Reply Comments at 4, n.4 (recommending that programmers should retain the discretion to decide whether to have advertising).

[126] In determining reasonableness, the ratio of advertising to programming that a lessee proposes to offer could be compared to the amount of advertising on the Sirius XM channels that include advertising. We would expect Sirius XM to allow lessees to air a comparable amount of advertising as is aired on other channels included in the Sirius XM service. By permitting a reasonable amount of advertising, we are not promoting the use of advertising or otherwise modifying our prohibition that Sirius XM not exert editorial control over lessees' programming.

[127] These requirements do not bar Sirius XM and lessees from voluntarily entering into commercial agreements that allow Sirius XM to purchase advertising on the leased channels.

[128] *See, e.g.,* RSS Comments at 6.

[129] In the context of the statutorily mandated DBS NCE set-aside, 47 C.F.R. § 335(b), the Commission required DBS providers to make the NCE programming available to subscribers within six months of the effective date of the new rules (this requirement did not apply to programming offered by programmers that were selected at a later date). *See DBS PI Order* at 23309; 47 C.F.R. § 25.701(f)(7). In this context, because the Leasing Condition, as implemented by this Order, requires that leases or other agreements be entered into by a deadline, we believe this deadline provides similar assurances that Sirius XM will expeditiously implement this condition. We believe that it is in the public interest for Sirius XM to make the leased channels available to subscribers as soon as possible, considering the specific interests and needs of each lessee. We note that several interested lessees have indicated that they could provide programming within 90 days after the leases are awarded. *See* AIR Comments at 10; RSS Comments at 2, 6, 9-10, and 13; Entravision Reply Comments at 6; and Radio Korea Reply Comments at 2. To the extent a lessee is capable of making such a commitment, we encourage Sirius XM to include specific timeframes in each lease. If lessees believe that Sirius XM is not making their programming available to consumers in a timely manner due to bad faith or other unreasonable delay, they may file a complaint with the Commission, as explained below. *See* Section II.E, *infra*. Sirius XM could, however, take into consideration a potential lessee's readiness to provide programming in making its selection.

[130] *Sirius-XM Merger Order*, 23 FCC Rcd at 12410, 12435, ¶ 134, App. B.

Commission include enforcement mechanisms for the implementation of the Leasing Condition. In particular, AIR proposes that alternative dispute resolution procedures be used to resolve conflicts that arise in the implementation of the Leasing Condition.[131] Entravision posits that if Sirius XM is involved in the process of selecting lessees, then lessees should have the ability to request Commission review of selection decisions.[132]

45. We agree that it is reasonable to include some enforcement mechanisms for aggrieved entities. Initially, we will rely on the Media Bureau's review of Sirius XM's selection of proposed lessees for compliance with the definition of a Qualified Entity.[133] With respect to other aspects of implementation of the Leasing Condition, we will rely on a complaint process. The DBS NCE set-aside offers a complaint process and we conclude it is appropriate to adopt the same approach here.[134] As a result, entities that believe Sirius XM has failed to implement the Leasing Condition in whole or in part, or has failed to follow our guidelines, may file a complaint with the Commission. As we do in the case of the DBS NCE set-aside, we will evaluate any complaints regarding the Leasing Condition on a case-by-case basis. As noted above, however, the Commission will not entertain complaints that second-guess Sirius XM's good faith selection of one Qualified Entity over another applicant where the selected lessee meets and continues to meet the definition of a Qualified Entity, pursuant to Sirius XM's certification and the Media Bureau's review thereof, and Sirius XM followed the transparent selection requirements and capacity allocation directions set forth in this Order.

46. Sirius XM is required to comply with the transparent selection process as described above in Section II, including the requirement to file the name of a proposed lessee with the Media Bureau, to demonstrate compliance with the definition of a Qualified Entity prior to signing any leasing agreement for the set aside channels. The *Sirius XM Merger Order* provided that Sirius XM would "enter into" long-term leases consistent with the Leasing Condition within four months of merger consummation.[135] On May 29, 2009, when the Media Bureau initially extended the compliance deadline, we indicated that the Commission would address any additional timing issues in this implementation order.[136] To balance the need to permit Sirius XM sufficient time to establish and implement its selection process with the public interest in expediting the availability of new programming, we will require that Sirius XM enter into and finalize leases by the implementation deadline of April 17, 2011. We further require that both Sirius XM and the lessees negotiate their leases in good faith to ensure that the leased channels are made available to SDARS subscribers as soon as possible. Additionally, we require Sirius XM to file a report with the Commission within 30 days after the implementation deadline to identify the lessees with whom it has entered into leasing agreements, to identify which lessees are new entrants, to state whether the lessees propose to address the interests of underserved audiences, and to inform the Commission of its timetable for airing new programming pursuant to its leases. The report will provide the Commission with an opportunity to review Sirius XM's compliance with the Leasing Condition.

[131] AIR Apr. 30, 2009 *Ex Parte* at 2-3.

[132] Entravision Reply Comments at 6-7.

[133] *See supra* ¶ 23.

[134] *See DBS PI Order*, 13 FCC Rcd at 23301, ¶ 111 (permitting noncommercial and educational programmers in the DBS context to file complaints regarding a DBS provider's potential misinterpretation of eligibility requirements or abuse of discretion).

[135] *Sirius XM Merger Order*, 23 FCC Rcd at 12409-10, 12434, ¶ 134, App. B.

[136] *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57, Order, 24 FCC Rcd 7367 (MB, rel. May 29, 2009). *See also supra* ¶ 6 and n.7 (listing the previous extensions of the compliance deadline).

III. ORDERING CLAUSES

47. Accordingly, having reviewed the record in this matter, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303(r), 309, 310(d), that this *Memorandum Opinion and Order* IS ADOPTED and Sirius XM is directed to implement the Leasing Condition, as described herein and pursuant to the guidelines provided in this decision.

48. IT IS FURTHER ORDERED that the Media Bureau is hereby delegated authority to review Sirius XM's selection of proposed lessees for compliance with the definition of Qualified Entity as adopted in this *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57

The Commission takes action today to foster the availability of diverse programming to satellite radio subscribers and to promote access to the satellite radio platform for independent programmers and new entrants, including small businesses, women, and minorities. This Order ensures that Sirius XM will reserve channels for programmers truly independent of Sirius XM, who will be new voices on the satellite radio platform, providing original programming of a type not already available, or service to historically underserved audiences. The Order paves the way for the prompt introduction of these new services, affording smaller, independent programmers a meaningful opportunity to obtain satellite radio distribution.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57

Two years ago, I dissented to the Sirius-XM merger. While the majority endorsed a number of conditions as prerequisite to Commission approval, I stated my belief that they did not off-set the potential for consumer harms, and I noted also that some of them were chock-full of holes and limitations that could render them meaningless.

Today the Commission attempts to make sense out of one of those voluntary commitments--for Sirius-XM to lease a portion of its channel capacity to Qualified Entities. Following approval of the merger, it quickly became apparent that this particular condition--perhaps well-intentioned, but hastily and inartfully drawn—was going to cause problems. It did, and it has taken more than two years to get to today's solution. Those were two lost years for more diverse programming on these satellite channels.

Hopefully the balance struck today can open the door to more diverse voices emanating from the merged entity. The conditions in this Order are fairly rigorous and also appear more likely to withstand legal scrutiny. Certainly a merger of this size and scope requires incentive for the new company to offer an array of program channels that otherwise might not make it to the air in a consolidated market. We have arguably accomplished this here. Hopefully this will pave the road for the delivery of more diverse content to underserved audiences.

I encourage as many qualified participants as possible to apply for these new opportunities. And I express my strong hope and confidence that the required FCC review of the qualified entities chosen by Sirius-XM will be diligent to ensure that the company follows the agreed-upon instructions to the best of its ability in making its selections.

I thank the Media Bureau for its hard work in navigating the difficult questions presented by the original merger approval. I also thank the company for its serious and sustained engagement to work through these problems and come up with today's resolution. The original merger condition for these particular programming commitments created legal vulnerabilities not only for the Commission, but for the company, too. Hopefully this item corrects the original error and will open the way for more of the kind of diverse programming that our country so desperately needs.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee,* MB Docket No. 07-57

I am pleased to have this Order implementing the channel set-aside commitment that XM-Sirius agreed to as a condition of their merger three long years ago. This important step will create real opportunities for new entrants to program on a national platform that reaches over 19 million subscribers.

As a result of this action, four percent of the XM and Sirius channel capacity is available for new and diverse programming from new and diverse programmers. These new voices can add new content to attract an expanded audience to Sirius XM and offer access for entrepreneurs to a media platform. We encourage Sirius XM to take full advantage of this opportunity for a win-win-win for their service, new lessees, and new subscribers.

Yes, it has taken a while to finalize the terms of this condition. And No, it is not perfect in my opinion. However, the Order strikes an intelligent and well-crafted balance that defines entities that can qualify for the set aside and establishes procedures and criteria for their selection. The Order wisely involves Sirius XM in the process, instructs them on the factors to consider, and permits them to use customary terms in their contracts with the selected entities. I am also pleased that the Commission will play an ongoing role in reviewing Sirius XM's implementation of the leasing condition. I look forward to working closely with my colleagues on the Commission and with the Media Bureau as we monitor Sirius XM's steps to bring this condition to life.

I commend the Media Bureau and the Chairman on threading this needle to negotiate with Sirius XM while holding fast to the fundamental goal of opening up this unique platform for new voices. And I thank Sirius XM for reaching this agreement. I trust it will implement the condition in a manner that will achieve the goals articulated in the Order: to promote source, viewpoint, and programming diversity expeditiously.

I think the completion of this process was, frankly, a challenge due in large part to the approach taken in the Merger Order three years ago.

I am not, however, going to look backwards. I am looking forward to do all that I can, working with my colleagues on the Commission, to achieve an even better result in future transactions. We learned much from this experience, both in terms of process and substance.

First, in future transactions, let's include all the details associated with similar conditions in the merger order itself, rather than leaving the details to be addressed in a later proceeding.

Second, to facilitate that result, I urge interested parties to submit in the record concrete ideas for how to implement conditions and commitments. A complete record with concrete data will greatly enhance our decision-making.

Third, to those who have criticized the terms of this agreement, I say that we have a laudable achievement here. It is no surprise that we can't please everyone, but there are people and entities that now have a chance to reach a nationwide audience who did not have that chance before this action. Those entities that already have a presence on Sirius XM do not need this opportunity and those that already have a broadcast voice can participate but cannot dominate this new opportunity.

Fourth, these terms are not a template for other transactions. We will consider what we have learned here and strive for improvements in the next transaction and the ones after that. This is a dynamic

process, tailored to the applicants and industries involved in each case and necessarily limited by applicable laws. I look forward to creative approaches and cooperative efforts to deal with the limitations we confronted here.

I am pleased to see the Chairman and transaction team taking a systematic and practical approach going forward. I am also pleased that providing and protecting opportunities for new entrants is front and center in ongoing proceedings.

I cast my vote today with a sense of pride in getting this job done, the best way we can in these unique circumstances. I look forward to upcoming proceedings to give us the opportunity for even greater strides in this direction.