

FCC Proceeding 07-57

MB Docket No. 07-57

Reply comments, electronically filed using ECFS on December 17, 2010

The Honorable Genachowski
Chairman, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Reply comments to the November 18, 2010 Petition for Reconsideration or Clarification filed by David Honig, MMTC

Dear Chairman Genachowski and fellow Commissioners:

As a concerned citizen and consumer following the consummated satellite radio merger between Sirius Satellite Radio and XM Satellite Radio, and subsequent transactions, I hereby submit these reply comments to the November 18, 2010 Petition for Reconsideration or Clarification filed by David Honig, et al., at MMTC. Please submit my attached comments into the public record.

Respectfully submitted,

Patrick Sharpless

REPLY COMMENTS TO THE NOVEMBER 18, 2010 PETITION FOR RECONSIDERATION OR CLARIFICATION FILED BY DAVID HONIG, ET AL., AT MMTC

After a long and arduous merger review, Sirius and XM finally consummated their merger, only to have the FCC take yet another swipe at the company and their shareholders with another long and arduous review of the qualified entity set-aside condition. The FCC's public notification of their progress—extending the deadline multiple times for reasons that weren't adequately explained along the way—was sketchy at best, and reminiscent of the merger review itself from the previous Commission. Thankfully, the new Commission's ruling on the qualified entity set-aside condition appeared, on its face, to be a reasonable outcome; all things considered.

It was almost too good to be true: the new Commission, faced with the daunting task of resolving a constitutionally conflicted qualified entity set-aside mandate, compounded by public awareness that the FCC's actions are suspect at best and likely the actions of a captured regulator acting in opposition to the public interest by using racially engineered regulatory mandates to entangle the consummated Sirius XM in a never ending quagmire of regulatory burden, was somehow able to preserve the integrity of a qualified entity set-aside and simultaneously resolve the unconstitutional race based criteria initially imposed by the previous Commission. Some would consider the current Commission's achievement a sign of hope that the FCC is capable of restoring the public trust, which they themselves have undermined for decades. And yes, that miraculous decision as imperfect as it was, was nevertheless a reasonable decision under the circumstances; although a better decision would have been to abandon the bandwidth set aside and qualified entity leasing condition altogether. Unfortunately, it wasn't miraculous enough because it left room for yet another entity seeking to continue abusing the regulatory review process to file yet another petition seeking yet another FCC review, which ultimately wouldn't serve any public interest benefit whatsoever.

It's bad enough that MMTC lacks the required standing to make the petition they did, but the focus of their interests with their *Petition for Reconsideration or Clarification* has the outward appearance it is less concerned with satellite radio, the public interest, orderly FCC activity, or even minority concerns; and more interested in capturing additional media brokerage market share. I find nothing wrong with enterprising business gaining market share, I just don't think the public benefits from having Sirius XM and their shareholders watch media

brokers pursue regulatory intervention whenever an opportunity exists to exploit the regulatory review process for personal gain. Nor do I believe the FCC should recognize those exploits by accommodating them.

To the extent something had to be done with the former Commission's irreconcilable mandate, I believe the FCC's recent decision concerning the qualified entity set-aside condition struck a reasonable balance between constitutionally protected equal treatment, and allowing recognizably diverse companies like Sirius XM to remain unencumbered by racially engineered regulatory mandates. It makes no difference how those racially engineered regulatory mandates are described—be it a 'special consideration', an 'educational mission', or a 'language' or 'treaty' based dichotomy—it simply wouldn't be appropriate or useful to plague already diverse companies with any form of racially engineered mandates if the programs and incentives are applied under the wrong circumstances or to the benefit of the wrong people. Which is exactly why the Commission doesn't need to provide more guidance to Sirius XM on what a qualified entity is or should be. Sirius XM already understands the importance of diversity and how qualified entities under the *Supplemental Merger Order* should be employed.

Reasoning the *Supplemental Merger Order* is vague and ambiguous because it fails to give adequate guidance on how to increase diversity not only ignores the intent behind the Commission's order, but fails to recognize 1) the contribution Sirius XM has already made to diversity, and 2) the opportunity made available for Sirius XM to continue fulfilling the *Supplemental Merger Order's* original purpose. And just because media brokers aren't the primary beneficiary of the Commission's *Supplemental Merger Order*, doesn't make the order any less beneficial to 1) the public interest, or 2) diversity inspired policy objectives.

It is flawed to think competitors to satellite radio and their lobbyists should mandate through regulatory fiat which broadcasters should be given preferential treatment for qualified entity status. It is equally flawed to expect the entire world of diverse entities should have a stake in leasing satellite radio bandwidth because the media brokers say so. This approach would necessarily lead to aggrieved qualified entities being rejected for leasing opportunities, not because of their status, but for practical and other unavoidable considerations, yet those aggrieved parties will nevertheless satisfy the self-fulfilling prophecy of MMTC's proposals and thereby create a new set of unending challenges for the FCC, Sirius XM and the public interest to face. Conversely, Sirius XM is rightly responsible for administering the leasing conditions to qualified entities, just as the FCC has provided through their *Supplemental Merger Order*. To the extent that a particular candidate is especially well-qualified, and suitable for leasing bandwidth from Sirius XM, the satellite radio company should make that

determination, and it wouldn't be appropriate or necessary for any competitor, lobbyist or regulator, to make those decisions for Sirius XM.

I do agree, in part, with MMTC's assertion regarding non-precedential concerns when applying qualified entity status to other candidates beyond the Sirius XM docket. Specifically, the FCC should require stringent application of diversity promoting policies to companies with demonstrated diversity violations. And by extension, those companies like Sirius XM which successfully foster a richly diverse business, should have little interference from regulators since FCC policy objectives designed to promote diversity are counterproductive to an already diverse business enterprise; especially when those business practices continue promoting diversity in an efficient and constructive manner.

The FCC should deny MMTC's *Petition for Reconsideration or Clarification*. MMTC's proposals are misguided, they fail to advance the policy objectives of the FCC, and as these new proposals abandon the constitutionally challenged race based proposals of the previous Commission, they create a new endless quagmire of race neutral but not racially dilute entities, all of which couldn't possibly lease satellite radio bandwidth at the same time, and would necessarily become aggrieved if their petition for leasing bandwidth were to be rejected. This is precisely the concern the recent *Supplemental Merger Order* sought to avoid, and for good reason. The appropriate alternative to MMTC's proposals would be to create a new Supplemental Merger Order and completely abandon the qualified entity leasing condition altogether. Otherwise, MMTC's proposals should be denied because they provide no legitimate constructive purpose and lack proper standing.