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Commission Extends (Again) Time For Compliance With XM/Sirius Merger Conditions

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Exactly one year ago, the FCC granted its consent to the merger of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings, Inc., clearing the way for the current XM/Sirius monopoly in satellite radio services. At the time, XM and Sirius agreed to a number of “voluntary commitments” as a condition for the FCC’s approval. One of those voluntary commitments was to enter into long-term leases or other agreements giving “Qualified Entities” the right to program up to four percent of the channels on each service platform. (Other voluntary commitments included retail price caps, new programming packages, interoperable receivers, and open access for third party equipment manufacturers to develop compatible satellite radio receivers.) Although the original commitment was to enter into these leases within four months of the merger, the FCC recently extended the deadline while the FCC continues to sort out essential practical details, like the definition of a “Qualified Entity” and the process by which such leases should be made available.

One of the chief concerns about creating a monopoly in satellite radio service was that having a single entity owning and operating all of the country’s satellite radio capacity might limit the diversity of viewpoints on satellite radio. The commitment to lease capacity to third parties was intended to address that concern. These third parties would not be required to make any lease payments for the channels and XM/Sirius would not be involved in the selection of the third parties or have any editorial control over their programming. Such leases, however, were limited to “Qualified Entities”, which the FCC initially defined as any entity that is majority-owned by persons who are African Americans, Asian or Pacific Islanders, American Indians, or Alaskan Natives, or Hispanics.

Even when the FCC approved this “voluntary” commitment, it was clear that implementing it would require the FCC to resolve many complicated details. How would an explicitly race-based policy survive Constitutional scrutiny? Should the definition of “Qualified Entity” be more expansive? Should there be technical or financial qualifications for third party programmers? Would there be a single third party programmer or would many programmers have access? What mechanism would be used

to select third party programmers? Who would oversee the selection procession? What criteria would be used to choose between programmers if the demand for channels exceeded the supply? What is the duration of these “long-term” leases? Would programmers need to provide 24/7 programming or would the channels be subject to “time sharing” among many programmers? If so, how would the various day parts be allocated? Although the FCC acknowledged many of these concerns at the time, it declined to address any of them leaving them to be worked out “at a later date.”

Here we are, a year down the road, and that “later date” has yet to arrive. The XM-Sirius merger closed on July 28, 2008 – so the obligation to lease capacity to Qualified Entities technically should have kicked in by November 28, 2008. The FCC, however, didn’t even request public comments on the various issues surrounding the proposed channel leases until the end of February, 2009. Thus, the FCC has been granting a series of extensions to the deadline – the most recent of which was issued on June 29, 2009.

In the meantime, the FCC has received a variety of comments proposing several different schemes for allocating the channels to variously-defined “Qualified Entities.” One commenter suggested that a single independent entity should be designated as the channel administrator (and – here’s a surprise – proposed itself as the ideal candidate for the task). Another insisted that only the FCC could allocate and administer the channels. Some commenters urged the FCC to restrict access to minority-controlled non-profits, while other commenters urged the FCC avoid Constitutional problems by using a more race-neutral definition of “Qualified Entities.”

While the FCC has not given any indication on how it might resolve these open issues, there may be light at the end of this tunnel. The FCC’s June extension of the leasing commitment stated that the Media Bureau “anticipates Commission action on the implementation guidelines in the very near future.” Then again, the Bureau’s May, 2009 extension order said exactly the same thing. Regardless, minority programmers are not advised to hold their breath waiting for access to the XM/Sirius platform. The qualifications and mechanisms which the FCC may eventually select are bound to disappoint someone(s), and disappointed people tend to file appeals and challenges, which will take time to resolve. Add in the time to actually implement whatever mechanisms survive the process and we may see yet another year pass before a third party programmer is heard on satellite radio.