

**WHITE PAPER ON FCC, SIRIUS XM AND ADARAND: HOW ICLICK2MEDIA'S
AMERICAN INDEPENDENT RADIO SOLVES THE PROBLEM**

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Summary

The concept of American Independent Radio (AIR) was designed to allow independent radio content providers, members of the underserved class that have been absent on an ever shrinking on the airwaves. The FCC has an obligation to insure fairness in the marketplace and Sirius XM realized that it had moral responsibility to give space on its dial to voices that are not normally heard on terrestrial radio but need to be heard on satellite. Their Voluntary Commitments to make available four percent (4%) of its capacity for use by certain Qualified Entities, and an additional four percent (4%) of capacity for the delivery of noncommercial educational or informational (“NCE”) programming opens the gate for these Qualified Entities members of the underserved markets to be heard and join the digital wave of radio.

As stated in comments filed by iClick2Media, iClick2Media is a subsidiary of Independent Creative Artists (hereinafter ICA) is a production and distribution company that specializes in delivering content on various digital formats and mediums. ICA’s concept American Independent Radio (hereinafter “AIR”) in February of 2009 began its quest to act as the sole company that would act as the Independent Entity capable of managing, aggregating and preparing unaffiliated content for transmission. AIR is uniquely qualified and positioned to be a true independent entity to administer all 24 channels and under its brand and concept believes AIR will foster competition among members of the underserved markets and walk the fine line between Race Neutral and Race Preference.

It should be noted that when iClick2Media first filed its comments as a result of the Public Notice¹ seeking comments on the implementation details of the Leasing condition it had begin working with AlphaStar as its transmission facilities partner. However since that filing and subsequent filings in June of 2009 AlphaStar decided not to continue its pursuit with iClick2Media on acquiring the licenses made available by Sirius XM Voluntary Commitments and as a result iClick2Media has continued to move forward with its goal still in focus to become the sole licensee of the four percent commercial and four percent non-commercial channels under Sirius XM

It has been two years since the merger between Sirius and XM has been finalized. On February 27 2009 a Public Notice² seeking comments on the implementation details of the Leasing condition³ and Prior the most recent Order dated May 24, 2010⁴ where the Media Bureau, on its own motion granted an extension until August 23 2010 there has been several other such order of such extension⁵. iClick2Media since February 27, 2009 have met and or spoken to Members of the Media Bureau several times.

¹ *Media Bureau Seeks Comments on Implementation of Sirius-XM Merger Conditions that four percent of Audio Channels be Leased to Qualified Entities and Extends the Deadlines for Compliance with this Condition*, MB Docket No. 07-57 Public Notice 24, FCC Red 2855 (MB, rel. Feb 27, 2009)

² *Id*

³ *Id*

⁴ *In the Matter of Application for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inv To Sirius Satellite Radio Inc.* MB Docket No. 07-57

⁵ *Application 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 24 FCC Red 2855 (MB, rel. Feb 27, 2009). The Media Bureau, on its own motion, subsequently extended the deadline for the Leasing condition until June 29, 2009. *Application for Consent it the transferee*, MB Docket No. 07-57, *Order, DA 09-1212* (MB, rel. May 29 2009). Previously, the Media Bureau also on its own motion, had extended the deadline for the Leasing Condition form November 28, 2008, until February 27, 2009. *Application for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc.*, Transfer, MB Docket No. 07-57, *Order, 23 FCC Red 17285* (MB. Rel. Nov. 28, 2008)

During those conversation iClick2Media has and continue to seek control over the 24 channels made available by the Sirius XM Voluntary Commitments⁶ and the importance of using mobile to reach the underserved market.

The purpose of these additional comments submitted by iClick2Media an Independent Creative Artists company is to discuss:

1. American Independent Radio (AIR)

- a. How AIR is defined
- b. What AIR plans and goals for the 24 Channels

2. The implication of *Adarand*

- a. *Adarand* Defined
- b. Strict Scrutiny
- c. The Effect of *Adarand* within Governmental Agency and why its not Applicable

3. AIR Selection approach

- a. Selecting AIR would foster competition through the creation of an entirely independent entity capable of managing and aggregating content from the underserved markets
- b. AIR is uniquely qualified and positioned to be a true independent entity to administer of the 24 channels
 - i. Enforcement of Nondiscrimination in Contracting
- c. AIR will adopt a quasi-public process and encourage participation from public
 - i. Internet Postings and Searchable Databases
 - ii. Conferences, Meetings, Forums, Media, and Printed Materials
 - iii. Ensuring the Inclusiveness of Outreach

4. Supporting statistic of why American Independent Radio makes Sense

- a. Recap of Statistical Date Submitted
- b. Pew Internet & American Life Project
- c. Social Media

5. The wrap-up

⁶ *In the matter of Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee* Memorandum Opinion and Order and Report and Order

1. American Independent Radio

(a) How AIR is defined

American Independent Radio (hereinafter "AIR") is a concept created under iClick2Media Mobile Network a division of Independent Creative Artists, whose goal it to use the 24 channels as a Digital Grassroots Movement for the underserved markets voices, ideas and goals that can be heard in a race natural space. AIR believes that if the lines of racial inequality are to be erased then building a free and open understanding of who people are what they share in common, their likes and dislikes are quintessential to making a difference for the underserved markets currently not represented.

(b) What AIR plans and goals for the 24

AIR's concept is to break the channels up by topic not race using the common thread of being human to inform, educate and give the underserved market the opportunity to be on the satellite radio. By defining the proposed channels by topic AIR broaden the spectrum of talent, interest and diversity of its content provider and increase its pool of potential listener. AIR's concept fits perfectly with Sirius XM *A la Carte Programming I* as outlined in the *Memorandum Opinion and Order Report and order*⁷. AIR concept along with Sirius XM *A la Carte Programming I* insures the underserved markets needs are met, a broader customer base can be achieved and the line between race-neutral/race preferences is achievable.

2. The Implication of Adarand

(a) Adarand Defined

In *Adarand Constructors, Inc. v. Peña*⁸, the United States Supreme Court held that "**all racial classifications, imposed by whatever federal, state, or local government agency**" must be analyzed by a reviewing court under the standard of "strict scrutiny".

(b) Strict Scrutiny

Strict scrutiny⁹ is applied based on the constitutional conflict at issue, regardless of whether a law or **action** of the U.S. federal government, a state government, or a local municipality is at issue. It arises in two basic contexts: when a "fundamental" constitutional right is infringed, particularly those listed in the Bill of Rights¹⁰ and those the court has deemed a fundamental right protected by the liberty provision of the 14th Amendment¹¹; **or when the government action involves the use of a "suspect classification" such as race or national origin that may render it void under the Equal Protection Clause**¹². To pass strict scrutiny, the law or policy must satisfy a three-prong test:

- i. It must be justified by a compelling governmental interest.

⁷ *In the matter of Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee* Memorandum Opinion and Order and Report and Order pg. 40

⁸ 515 U.S. 200 (1995)

⁹ McCormack, Alfred (1946). "A Law Clerk's Recollections". *Columbia Law Review* **46** (5): 710–718

¹⁰ Bill of Rights

¹¹ 14th Amendment

¹² Equal Protection

- ii. The law or policy must be narrowly tailored to achieve that goal or interest. If the government action encompasses too much (over-inclusive) or fails to address essential aspects of the compelling interest (under-inclusive), then the rule is not considered narrowly tailored.
- iii. Finally, the law or policy must be the least restrictive means for achieving that interest. More accurately, there cannot be a less restrictive way to effectively achieve the compelling government interest, but the test will not fail just because there is another method that is equally the least restrictive.

In *Schwegman Constructors and Engineers, Inc.*,¹³ the Supreme Court held racial classifications must be subject to strict scrutiny and must serve a compelling governmental interest and be narrowly tailored to further that interest. *Schwegman*¹⁴ further contends that following the court decision in Adarand racially based set-aside programs imposed by the federal government are subject to the same level of “strict scrutiny” applied to racially based set-aside programs at the state or local level, see *City of Richmond v. Croson Co.*,¹⁵. Here is where the problem begins. The law or policy that must satisfy the three-prong test required to pass strict scrutiny is not here.

- i. **It must be justified by a compelling governmental interest.** There has not been a law or policy compelling a government interest or has the government developed, created, implemented by any governmental agency including the FCC. The Voluntary Commitment¹⁶ were terms created by two private companies XM Satellite Radio and Sirius Satellite Radio (that are regulated by the FCC but are not nor have they ever been governmental agency) that wanted to merge the companies and under the terms of their agreement decided to create a Voluntary Commitment to set aside four percent (4%) commercial and four percent (4%) non-commercial channels to a Qualified Entity or Qualified Entities under the new company’s moniker Sirius XM. The terms of the Voluntary Commitment included as part of the approval of said mentioned merge a clause that focused on the **Public Interest and Qualified Entity Channels**. The definition of Qualified Entity or Qualified Entities include any entity that is majority-owned by persons who are African-American, not of Hispanic or origin; Asian or Pacific Islanders; American Indians or Alaskan Natives; or Hispanics. So if Voluntary Commitments made by two private companies that that are publicly traded to set aside four percent (4%) commercial and four percent (4%) non-commercial channels and defined whom would qualify for them how then can Adarand be applied.
- ii. **The law or policy must be narrowly tailored to achieve that goal or interest.** If the government action encompasses too much (over-inclusive) or fails to address essential aspects of the compelling interest (under-inclusive), then the rule is not considered narrowly tailored. Although the scent of Adarand may be present the one key component that opens the door to Strict Scrutiny is not present. In *Lee v. Washington*¹⁷ a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities see e.g., *Grutter v. Bollinger*¹⁸ to have standing, the ‘injury in fact’ necessary to establish standing in this type of case is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. Further according to *Northeastern Florida Chapter, Associated General*

¹³ 1996 WL. 490015 (Comp. Gen.), B- 2223, 96-2 CPD P 90

¹⁴ Id

¹⁵ 488 U.S. 469 (1989),

¹⁶ *In the matter of Application for Consent to the Transfer of Control of the Licenses XM Satellite Radio Holdings Inc., Transferor To Sirius Satellite Radio Inc., Transferee* Memorandum Opinion and Order and Report and Order Appendix B Voluntary Commitments pg. 86-89

¹⁷ 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212

¹⁸ 539 U.S. 306, 353, 123 S.Ct 2325, 156 L.Ed.2d 304

*Contractor of America v. Jacksonville*¹⁹ in the face of such a barrier, to establish standing, a party need only demonstrate that it is able and ready to perform and that a discriminatory policy prevents it from doing so on an equal basis. *Idib*. Since there is no policy that was or currently imposed by the FCC (a governmental agency) as it relates to the Sirius XM Voluntary Commitment to set aside four percent (4%) commercial and four percent (4%) non-commercial channels to a Qualified Entity or Qualified Entities and since Sirius, XM and or post merger Sirius XM is not nor have they ever been a governmental agency therefore the application necessary for *Adarand* again is not here is not here. Further there was never a governmental program created out of a need by the FCC that would include Qualified Entity or Qualified Entities with Sirius, XM, and or after the merger Sirius XM. Nor was there a compelling governmental interest from any federal, state, and or local governmental agency that needed to be met as a result of the merger between Sirius XM as it relates to race.

- iii. **Finally, the law or policy must be the least restrictive means for achieving that interest.** Sirius, XM, and after the merger Sirius XM separately were publicly traded companies and after the merger continue to be a publicly traded company therefore the application of “*law or policy must be the least restrictive means for achieving that interest*” cannot apply since Sirius XM has not nor has ever been a governmental agency. Further there has never been any policy and or compelling governmental interest from any federal, state, and or local governmental agency that has been made, implemented and or granted for Sirius XM.

(c) The effect of *Adarand* within Governmental Agencies

In September 2005, the U.S Commission on Civil Rights²⁰ issued a report finding that, ten years after the *Adarand* decision, federal agencies still largely fail to comply with the rule in *Adarand*. Specifically, the Commission found that the Departments of Defense, Transportation, Education, Energy, Housing and Urban Development, and State, and the Small Business Administration, do not seriously consider race neutral alternatives **before implementing race-conscious federal procurement programs**. The U.S Commission on Civil Rights found that the Strict Scrutiny standard under *Adarand* and other Supreme Court decisions requires such consideration but not seriously consider race neutral alternatives therefore enforcement has not been able to be achieve. It seems clear the trigger for *Adarand* must be some federal, state, or local government agency program, law and or policy that brings to the forefront two basic contexts:

1. When a "fundamental" constitutional right is infringed, particularly those listed in the Bill of Rights²¹ and
2. Where the court has deemed a fundamental right protected by the liberty provision of the 14th Amendment²²; or
3. When the government action involves the use of a "suspect classification" such as race or national origin that may render it void under the Equal Protection Clause.

The three basic contexts have not been met then the next logical step can't be made because you need at least these two of these contexts before you get to strict scrutiny test and under the Sirius XM Voluntary Commitment to set aside four percent (4%) commercial and four percent (4%) non-commercial channels to a Qualified Entity or Qualified Entities in fact there are:

1. No constitutional rights infringed,

¹⁹ 508 U.S. 656, 666, 113 S.Ct. 2297, 142 L.Ed.2d 586

²⁰ U.S. Commission on Civil Rights Federal Procurement After *Adarand* Sept 2005

²¹ Bill of Rights

²² 14th Amendment

2. Nor are there any fundamental rights protected by the liberty provision of the 14th Amendment and
3. Finally there were no governmental actions that involve the use of a “suspect classification” that may render it void under the Equal Protection Clause.

In reviewing the scope of the *Adarand* decision is consisting with the interpretation of the case by the Department of Justice (DOJ). An analysis of the *Adarand* decision by DOJ states:

“Mere out reach and recruitment efforts...typically would not be subject to *Adarand* standards, indeed, post-*Corson* cases indicate that such efforts are considered race neutral means of increasing minority opportunity. In some sense, of course, the targeting of minorities through outreach ad recruitment campaigns involves race-conscious action. But the objective there is to expand the pool of applicants of bidders to include minorities, not to use race or ethnicity in the actual decision”.

The DOJ explained it as well:

“If the government does not use racial or ethnic classifications in the selection of person from the expanded pool, *Adarand* ordinarily would be inapplicable”²³.

If this is the case then how can *Adarand* apply to a non-governmental agency? It cannot. The fact of the matter is “The Voluntary Commitments” made by Sirius and XM was to ensure as stated by Chairman Kevin J. Martin:

“I said at the time that the two companies announced their intent to merge that I thought they had a high hurdle to meet if they wanted to prove that the transaction would be in the public interest. It has taken some time, but I do believe that with the essential Voluntary Commitments they have made, the parties have met this burden....I commend the parties for committing to offer more choice and flexibility in how they purchase channels....I am pleased that the parties have committed to offering consumers, for the first time, with a specific percentage of diverse programming. The companies have agreed to dedicate eight percent of their channels – 24 channels in total—to minority and public access programming. This will create greater opportunities for more voices to be heard on satellite radio, covering the issues that are important to those communities that may have traditionally been ignored in the past”²⁴.

This statement shows that *Adarand* cannot be applied because as mentioned above by Chairman Martin the two companies overcame the hurdle and came up with a formula that meet all the necessary needs to ensure fairness, flexibility, offering consumers diverse programming none of which were programs being imposed, created, implemented, and originated by the FCC or any other governmental agency

3. AIR Selection approach

a. Selecting AIR would foster competition through the creation of an entirely independent entity capable of managing and aggregating content from the underserved markets

The commission asked for comments on “weather their should be a single lessee or multiple lessees”, whether Sirius XM should be part of the selection process, and if not who should make

²³ Memorandum to All Agency General Counsels for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, at 7 (June 28, 1995) (footnotes omitted)

²⁴ Statement of Chairman Kevin J. Martin Re: *Application 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 selection.²⁵ AIR has and continues to propose that one entity be the lessee or trustee for selecting the sub-lessees, AIR is the entity. AIR process is not based on race solely but on what content of the underserved market that is current missing from the line-up on the Sirius XM, and how that content falls in line with Sirius XM *A la Carte I Programming* outlined in the Voluntary Commitments.

In the appendix is a deck that details AIR selection process. The process includes:

1. AIR Channels Breakdown
2. Pre-Marketing the application process
3. Requirement for selection
4. Time line for selection to launch Date
5. Use of Technology and
6. Post-Marketing

AIR believes that this process is the best to ensure the inclusion of the underserved market and would foster inclusion of women and minority in the satellite and mobile space. AIR also believes that the concern express in the Dissenting Statement of Commissioner Jonathan S. Adelstein²⁶ can be resolved by what AIR is proposing. According to his dissent Commissioner Adelstine wrote:

“Sirius and XM (collectively the “Applicants”) currently offer dynamic and competitive audio programming to consumers. Their marketplace competition with each other has undoubtedly contributed to their cutting edge appeal...The Applicants’ commitment to set aside four percent of full-time audio channels for noncommercial educational and informational programming as well as four percent for qualified entity programming is a small step in the right direction. There is no explanation, however, as to why these commitments are significant enough to offset the potential public interest harms by a merger to monopoly....And, it is left entirely unclear how the qualified entities will be selected, leaving the entire provision unintelligible and unpredictable. “We will determined the implementation details for use of these channels [for qualified entities] at a latter date,²⁷ is a clear indication of the Commission’s historic pattern of neglecting minority access to communication industry. Once again, rather than taking a decisive step forward to improve the plight of women and people of color in media, the Commission has taken a step to the side”.

AIR believes its selection process is too a small step in the right direction. Though it’s a Qualified Entities it is not focus on color solely, but focused on the needs of the underserved market, it’s need for content and its need to be independent. AIR also believes that the “side step” mentioned by Commissioner Adelstine and his concerns “why these commitments are significant enough to offset the potential public interest harms by a merger to monopoly” are workable to avoid the “potential public interest harms by a merger to monopoly”. First, AIR offers an independent voice with many other independent voices under its moniker. Second, it fits within the confines of the Voluntary Commitment *A la Carte Programming I* as outlined in the *Memorandum Opinion and Order Report and order*²⁸ and third by having one entity oversee the channels it can maintain its independence within the monopoly to ensure these voices never go silent and continue making steps in the right direction towards race neutral.

²⁵ Public Notice at Para 3

²⁶ Statement of Commissioner Jonathan S. Adelstein Re: *Application 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*

²⁷ *Order at Para 135*

²⁸ *Id.*

b. AIR is uniquely qualified and positioned to be a true independent entity to administer of the 24 channels.

Four (4) of the most active companies on the docket have their own plans for programming. Each meets the necessary qualification to be considered a Qualified Entity. Some have programming ideas that overlap with each other while others currently have terrestrial station nationwide. It should be noted that in February 2010 iClick2Media filed comments where it suggested to the FCC that the five (5) most active members on the docket work together to find a solution and suggested the creation of the Diversity Satellite Radio Consortium (hereinafter “DSRC”) however that concept has not been able to created because many parties on the docket believe these channels will never see the light of day. However AIR believes its quest for the underserved market is inline with what the true meaning of the Voluntary Commitment is and unlike them AIR’s focus is on the true meaning of what the underserved market represent. Though the Voluntary Commitment made by Sirius and XM defines race²⁹ but the market also covers other segment of the American population that can’t be defined by race. AIR believes that they too should have a voice, a space to express their ideas, topic and concerns. Though AIR is a minorities company it does not have the mentality of one. It realizes that if this country is too erasing racism it first needs to gets to a place where Race Neutral and Race preference blears. AIR’s goals, selection process, use of the Internet and mobile phones to get the content to the underserved markets are built on that foundation.

c. AIR will adopt a quasi-public process and encourage participation from public

a. Internet Postings and Searchable Databases:

As part of its out reach AIR will use the power of social media to spread the word. The power of social marketing as a tool to reach the potential user is better than word of mouth. For example if you have 5000 friends on Facebook and you post the opportunity to be come a radio host on Sirius XM with the link that one posting open the selection process to 5000 people with the push of a button. That one push turns into many others pushing the button on their computer sharing the information with their network of friends. Suddenly you know have a quasi-public notice that keeps on moving throughout the social network. A sample of iClick2Media Social

b. Conferences, Meetings, Forums, Media, and Printed Materials Ensuring the Inclusiveness of Outreach

AIR will also ensure it notifies key people that have and or are attached to networks, memberships and agencies that are members of the underserved market to get the word out about AIR and what its is, what content is needed and what the application process is. As stated in AIR Selection Deck attached herein the time line is 180 days until launch. There will be a notice period of 90 days before the selection process will begin. During that time AIR will maintain records online for the public, the FCC, Sirius XM and or others to view to ensure AIR remains an open application process. As an example of our concept the OWN Network (Oprah Winfrey & Discovery Network) launched a similar process where it used Facebook, Twitter, MySpace and oprah.com/own to get the word out to have people try to win a spot on a new reality TV series entitled “Your OWN Show on OWN!” Thought this was a voting selection process its core notification concept and ability to view people’s submission are in line with AIR core process. This process does three things. First keeps AIR neutral, second it open notification to people who would not know of this opportunity and thirdly it affords diversity of ideas from the underserved markets.

²⁹ A Qualified Entity includes any entity that is a majority-owned person who are African-American, not of Hispanic origin; Asian or Pacific Islanders; American Indians or Alaskan Native; or Hispanics.

4. Supporting statistic of why AIR makes Sense

In its comments submitted in March of 2009³⁰ iClick2Media provided statistical data to support its position of the need of the underserved market lack of a voice on the dial. They included The Infinite Dial³¹, Radio Today: A Quantitative History of Ownership Consolidation In The Radio Industry, Radio Today: How America Listens to Radio³², A Quantitative History of Ownership Consolidation In The Radio Industry³³ and Off The Dial: Female and Minority Radio Station Ownership in the United States³⁴. Each of the documents supports what Sirius XM Voluntary Commitments attempts to fix and the dissenting Statement of Commissioner Jonathan S. Adelstein that the state of minority radio is dismal. Though there have been steps made to increase minority participation in radio such as Clear Channel donating AM stations to the Minority Media and Telecommunications Council and offering to other organizations AM stations for free it is at best dated in a digital world. With the advent of digital communication, the internet and mobile device (i.e. Smart Phones) several generations now get their information from those sources not radio. Not radio especially AM Radio.

An example of this movement can be found in a study done by Pew Internet & American Life Project³⁵. A Summary of Findings concluded:

Home broadband adoption stood at 63% of adult Americans as of April 2009, up from 55% in May 2008.

The latest findings of the Pew Research Center's Internet & American Life Project mark a departure from the stagnation in home high-speed adoption rates that had prevailed from December 2007 through December 2008. During that period, Project surveys found that home broadband penetration remained in a narrow range between 54% and 57%. The greatest growth in broadband adoption in the past year has taken place among population subgroups, which have below average usage rates. Among them:

Senior citizens: Broadband usage among adult's ages 65 or older grew from 19% in May 2008 to 30% in April 2009.

Low-income Americans: Two groups of low-income Americans saw strong broadband growth from 2008 to 2009.

Respondents living in households whose annual household income is \$20,000 or less saw broadband adoption grow from 25% in 2008 to 35% in 2009.

Respondents living in households whose annual incomes are between \$20,000 and \$30,000 annually experienced a growth in broadband penetration from 42% to 53%.

Overall, respondents reporting that they live in homes with annual household incomes below

³⁰ White Paper American Independent Radio: Proposal to be the Qualified Entity or Independent Trustee to Administer and Manage the Unaffiliated Independent Content Programmers to be Transmitted on Sirius XM Channel Allotment per the Sirius-XM Merger Order

³¹ THE INFINITE DIAL 2008: RADIO'S DIGITAL PLATFORMS – Online, Satellite, HD Radio® and Podcasting 2006 Arbitron Inc., and Arbitron Radio Listening Report

³² RADIO TODAY: HOW AMERICA LISTENS TO RADIO – Arbitron 2008 Edition

³³ A QUANTITATIVE HISTORY OF OWNERSHIP CONSOLIDATION IN THE RADIO INDUSTRY: Future of Music Coalition, December 2006

³⁴ OFF THE DIAL: FEMALE AND MINORITY RADIO STATION OWNERSHIP IN THE UNITED STATES –How the FCC Policy and Media Consolidation Diminished Diversity on the Public Airwaves, Free Press, June 2007

³⁵ Pew Internet & American Life Project: Home Broadband Adoption 2009 – Broadband adoption increase, but monthly prices do too June 2009

\$30,000 experienced a 34% growth in home broadband adoption from 2008 to 2009.

High-school graduates: Among adults whose highest level of educational attainment is a high school degree, broadband adoption grew from 40% in 2008 to 52% in 2009.

Older baby boomers: Among adults ages 50-64, broadband usage increased from 50% in 2008 to 61% in 2009.

Rural Americans: Adults living in rural America had home high-speed usage grow from 38% in 2008 to 46% in 2009. Population subgroups that have above average usage rates saw more modest increases during this time period.

Upper income Americans: Adults who reported annual household incomes over \$75,000 had broadband adoption rate change from 84% in 2008 to 85% in 2009.

College graduates: Adults with a college degree (or more) saw their home high-speed usage grow from 79% in 2008 to 83% in 2009.

Notably, **African Americans** experienced their second consecutive year of broadband adoption growth that was below average.

In 2009, 46% of African Americans had broadband at home.

This compares with 43% in 2008.

In 2007, 40% of African Americans had broadband at home.

Why is this important? As iClick2Media as stated from the beginning it plans to implement the use of mobile devices to reach the underserved market and here are the hard fact about reaching that market and the potential for greater growth than ever before. According to the study:

A. **56%** of adult Americans have accessed the Internet by wireless means (i.e. using a laptop, mobile device, game console, or MP3 player).

B. Smart phones

1. One-third of Americans (**32%**) have used a cell phone or Smart phone to access the Internet for emailing, instant messaging, or information seeking.
2. On the typical day, nearly one-fifth (**19%**) of Americans use the Internet on a mobile device, up substantially from the **11%** a growth of **73%** in the 16-month interval between surveys.

C. African Americans are the most active users of the mobile Internet and their use of it is also growing the fastest. Among the highlights of the findings include:

1. **48%** of Africans Americans have at one time used their mobile device to access the internet for information, emailing, or instant-messaging, half again the national average of **32%**.
2. **29%** of African Americans use the Internet on their handheld on an average day, also about half again the national average of **19%**.
3. **32%** of African Americans used the Internet on their mobile on the average day

D. The high level of activity among African Americans on mobile devices helps offset lower levels of access tools that have been traditional onramps to the internet, namely desktop computers, laptops, and home broadband connections:

1. By a **59%** to **45%** margin, white Americans are more likely to go online using a computer on a typical day than African Americans.
2. When mobile devices are included in the mix, the gap is cut in half,
3. **61%** of whites go online on the average day when mobile access is included while **54%** of African Americans do.
4. African American and white Americans, on average, do the same number of activities.

E. There are also clear differences in attitudes about mobile access across racial categories:

1. With African Americans being very active in texting and IM-ing, it is no surprise to see them in the lead in viewing mobile access as a way to stay in touch with others.
2. African Americans also are more likely than whites to see mobile access as a way to share content with others while on the move.
3. The growth in use of the Internet on the handheld for African Americans is striking, particularly when focusing on the frequency of doing this on the typical day.
 - a. Recall that handheld Internet use on the average day grew by **73%** for the general population from the end of 2007 to the beginning of 2009.
 - b. For African Americans, growth was twice the rate of whites from **12%** to **29%** or a growth rate of **141%**.

F. So what does this all mean?

1. The gap in digital divide among race has begun to close and like Commissioner Adelstine statement regarding the Voluntary Commitment “this is small step in the right direction”.
2. That the underserved markets continue to want access to content and have the ability to develop and create content that is relevant to them and such created content has the ability to be beneficial the collective listeners on Sirius XM,
3. That African American's and Hispanic's are finding cost effective way to have access to the World Wide Web via their mobile device and are sharing that information via email, texting, twittering and facebooking, while giving a voice to the underserved markets,
4. With mobile phone providers (AT&T, Sprint, Verizon, T-Mobile and Metro PCS) offering smart phones at affordable prices and plans that combine phone, texting and web browsing causing an upsurge among the underserved markets; Combine it with the Voluntary Comments and give the underserved markets access to develop content for their base and access to the 19 million listeners currently on Sirius XM will opens new doors for satellite radio growth and can finally be a real step forward for the underserved markets and solid the foundation for real equality .

5. The Importance of Social Media

According to a study by IAB³⁶ on social media Internet World Stats says: the US is currently among the top online consumers in the world according to hours of use and penetration on the web. This is due to Social Network popularity and the user need to share information and content. By the end of 2009, 160.3 million people had accessed the Internet via a broadband connection (that would include smart phones with internet access). Social Media sites are characterized by the inherent functionality that facilitates the sharing of information between users within a define network i.e. AIR. The nature of Social Media allows for the initiation of conversation by either party; That conversation is currently happening among the members of the underserved markets and AIR can further those conversation by using social networks to inform, educate and assist in the development of ideas by the underserved market that is currently not happen on Satellite radio

Increasingly people want to join the conversation that is true of the underserved markets as well, for example in January of 2010 the audience for social media was 104,212. The following year in January 2009 115,083 and this year in January 2010 it was 149,285 (unique Audience for Social Media Sites, mm)³⁷. These numbers show a 20% annual rate of growth that is coming from the underserved market need access to the internet for content that reflect who and what they are. Social Media is an effect tool in AIR's goal to get the underserved market a place to be heard.

6. The Wrap-up

Adarand does not have a place here. It seems the fear of *Adarand* was more of a red herring than an issue at all. There has not been a law or policy compelling a government interest or governmental agency developed, created, and or implemented therefore *Adarand* cannot apply. AIR stands ready to build this network for the underserved market with our selection process. Further there are no fundamental" constitutional right that are infringed; the liberty provision of the 14th Amendment is not at issue either; and thought the use of a suspect classification is used the key element that is still needed is a law or policy compelling a government interest and it is not. AIR concept of using mobile to further the cause of moving the underserved market forward is quintessential to achievable inclusion and acceptance of its voice.

³⁶ IAB Stats Deck Social Media May 2010

³⁷ Nielsen Netview, 2010

APPENDICES DIRECTORY

AMERICAN INDEPENDENT RADIO

iClick2Media's Selection Process

HOME BROADBAND ADOPTION 2009

Broadband adoption increase, but monthly prices do too.

June 2009

Pew Internet & American Life Project

IAB STATS DECK

Social Media

May 2010

Contact Information