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Taking precedent Siriusly? – The FCC has asked for comment on whether a statement that it made ten years ago should be deemed a “binding rule” and if so, whether that rule should be changed or waived to permit the proposed merger of the only two U.S. satellite-delivered radio services, XM and Sirius.

If you’ve been living in a sensory deprivation tank for the last couple of months, you may not have heard that XM and Sirius are proposing to merge. Back in the misty ages of time, when the Satellite Digital Audio Radio Service (SDARS) was barely a glimmer in the eyes of some visionaries – that is, back in 1997 – the FCC had occasion to contemplate the possibility of future consolidation in the SDARS business. At that time, the FCC held in unequivocal terms that “one [SDARS] licensee will **not** be permitted to acquire control of the other remaining satellite DARS license” (emphasis added).

Fast forward ten years to 2007. There are only two SDARS licensees, and they are proposing to merge into a single entity – precisely what the FCC declared would **not** be permitted. What about that pesky old prohibition? Not to worry. Echoing the famous words of the pirate Barbossa (in *Pirates of the Caribbean: The Curse of the Black Pearl*), XM/Sirius argue that the FCC’s words weren’t really rules, but more what you might call guidelines. And even if they were really rules, they should be waived, or modified, or whatever, in order to let the merger proceed.

The FCC wants to know what the Great Unwashed – that is, anybody who isn’t XM or Sirius – thinks about all this. The deadline for filing comments is currently August 13; reply comments are due August 27. Let us know if you have any interest in sharing your thoughts on these topics with the Commission. – *Harry F. Cole*

Chief Justice Roberts: Student speech is bad; Corporate speech is good – At the end of June, the Supreme Court surgically removed a portion of the Bipartisan Campaign Reform Act (BCRA, a/k/a McCain-Feingold), the campaign reform act enacted with great fanfare five years ago. BCRA was originally pitched as a means of limiting the money spent on election campaigns. Among the restrictions affecting broadcasters was Section 203, which criminalized the use of general treasury funds by any corporation or union to pay for an “electioneering communication”, a term defined (for BCRA purposes) as any broadcast referring to a candidate for federal office that is aired within 30 days of a federal primary election or 60 days of a federal

general election in the jurisdiction where the election is being held. A corporation or union could still fund such ads through a separate Political Action Committee.

This provision was previously upheld by the Supreme Court against a facial First Amendment challenge. But the issue arose again after the Wisconsin Right to Life (WRL), a corporation, began broadcasting advertisements which mentioned by name certain senators (including, ironically enough, Senator Feingold, one of BCRA's namesakes), and urged voters to contact those senators to oppose a filibuster on the nomination votes of federal judges. The ads ran through June and July, 2004, but, come August, 2004, would have been prohibited as "electioneering communications" because of the then-approaching election. WRL sued the Federal Election Commission (FEC) for the right to continue airing the advertisements.

WRL's suit was rejected by a trial judge, who figured that the still-recent Supreme Court decision upholding BCRA left no room for WRL's "as applied" challenge (which dealt with WRL's three specific ads). The Supreme Court initially vacated the trial court's judgment in early 2006, holding that the earlier holding was never intended to prevent future challenges to BCRA. On remand, the trial court ruled in favor of WRL, and back the case went to the Supremes.

Chief Justice Roberts wrote the majority opinion of this 5-4 decision, with other members of the Court adding their own views in multiple separate opinions. Roberts first tackled the question of Section 203 of BCRA – which WRL conceded would be applicable to these advertisements. Roberts immediately identified that the "strict scrutiny" test would be applied to this content-based regulation. Thus, the burden would be on the government to prove that Section 203 furthers a compelling government interest and is narrowly tailored to achieve that interest (basic Con Law II here, folks). However, when the Supreme Court had looked at BCRA earlier, the FEC had demonstrated the existence of a compelling interest for Section 203 (the interest being the prevention of corruption, or the appearance of corruption, in political campaigns and the aggregation of wealth in corporations that do not mirror the desires of the voting public), so the Court moved directly to the second issue: whether the law is narrowly tailored to that interest so as to prohibit these particular advertisements.

The Court let the ads speak for themselves. Chief Justice Roberts said that, because the advertisements could be construed as something other than an express urging to vote for or against a candidate, they were not express advocacy advertising – in other words, the vagueness of the speech here would be resolved in favor of the corporate speaker. (This was in sharp contrast with the "Bong Hits 4 Jesus" case that the Court had decided just days before, with considerably less concern for the First Amendment rights of the speaker involved.) With that in mind, the Court concluded that these advertisements were *not* express advocacy ads because they were open to reasonable interpretation: they took a focus on legislative issues and requested only that the public contact a candidate with regard to that issue, not that the public vote for or against the candidate. Issue advertisements such as these do not carry the same concerns regarding corruption in the political process that exist with regard to express advocacy advertisements. Nor does the fact that corporations may have significant wealth justify preventing their speaking out on issues rather than endorsing candidates – issues are the lifeblood of an advocacy organization such as the WRL and they must be able to state their public position on public issues.

Justice Souter dissented, joined by Justices Stevens, Ginsburg and Breyer. Souter went to the trouble of reading his dissent from the bench, so angry was he with the apparent reversal of the Court's earlier decision which had appeared, for all practical purposes, to uphold BCRA. The dissenters believe that the majority has reopened the door to corporate spending to defeat candidates under the guise of promoting an issue.

What does all this mean for broadcasters? Only good things, we're sure. Broadcasters were never subject to criminal punishment under Section 203, so there was limited downside to an adverse Court ruling. But the Court's ruling opens the door to direct spending by corporations and unions during the periods before an election without fear of running afoul of Section 203. If, as many believe, the Court showed its sympathy for Corporate America in the decision, then the biggest subset of corporations that won were the broadcast media. – *Kevin M. Goldberg*