Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Application of Liberty Media Corporation For Consent to Transfer of *De Facto* Control of Sirius XM Radio Inc.	IBFS File Nos. SES-STA-20120320-00280 SES-STA-20120320-00281 SES-STA-20120320-00282 SAT-STA-20120320-00053 SAT-STA-20120320-00054 SAT-STA-20120320-00055 SAT-STA-20120320-00056 ULS File Nos. 0005137812 and 0005137854 Experimental License File Nos. 0007-EX-TC-2012, 0008-EX-TC-2012, 0009-EX-TC-2012

To: International Bureau
Office of Engineering and Technology
Wireless Telecommunications Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION OF DISMISSAL OF APPLICATIONS FOR CONSENT TO TRANSFER OF *DE FACTO* CONTROL

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Liberty Media Corporation ("Liberty Media") hereby replies to the Opposition to its Petition for Reconsideration filed by Sirius XM Radio Inc. ("Sirius"). Sirius' assertion that Liberty Media "offers no new material facts or arguments" (Opp. at 2) simply ignores new and specific factual information responding directly to the Bureau Decision and WTB Dismissal Notices and further demonstrating Liberty Media's ability and intent to exert *de facto* control over Sirius.

I. Liberty Media's Petition Provides New and Material Information.

The International Bureau and Office of Engineering and Technology denied Liberty Media's waiver requests and dismissed its applications, concluding that "the facts disclosed in the referenced applications are not sufficient to establish that Liberty Media intends to take

actions, such as conversion of preferred to common stock and installation of a board majority, that would constitute exercise of *de facto* or *de jure* control" over Sirius. *Bureau Decision* at 3; *see WTB Dismissal Notices* at 1. Liberty Media has provided new factual information regarding its forward purchase agreement for additional Sirius common stock,[1] additional purchases of Sirius common stock,[2] and its intent to convert approximately half of its Preferred Shares and to assert control over Sirius.[3] Sirius argues that none of this information "constitutes new material facts warranting reconsideration." Opp. at 3.

First, Sirius argues that Liberty Media's forward purchase agreement is not new information because the contract was executed on December 30, 2011 and suggests that Liberty Media has "wasted precious Commission resources" by withholding this information. Opp. at 4-5, nn.9-11. However, as Liberty Media stated in the Schedule 13D referenced by Sirius in its Opposition at 4, the number of Sirius shares to be acquired pursuant to the forward contract could not be fixed until the counterparty completed its initial hedge, which occurred on May 7, 2012. Liberty Media then filed an amended Schedule 13D on May 9, 2012 and disclosed the final number of shares that are the subject of the contract (302,198,700). Sirius contends that this represents "an additional 4% equity interest in Sirius" (Opp. at 4.), but those

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[1] Liberty Media has committed to "a forward purchase contract for 302,198,700 additional common shares of Sirius at an aggregate cost of approximately $649 million, the settlement date of which is July 11, 2012." Petition at 14; Declaration of Craig Troyer, dated May 30, 2012 ("Troyer Dec. 2"), at ¶4.

[2] Liberty Media "purchased 60,350,000 additional shares of Sirius common stock in open market purchases on May 8 and 9, 2012 at an aggregate cost of approximately $120 million" and intends to continue purchasing additional common shares of Sirius. Petition at 14; Troyer Dec. 2 at ¶3.

[3] "Liberty Media currently intends to convert approximately one-half (49.9%) of its Preferred Shares, which together with the additional common shares of Sirius that it has purchased and may continue to purchase will constitute more than 32% of the total outstanding common shares of Sirius, making Liberty Media by far the single largest common shareholder of Sirius.... Following the conversion of such Preferred Shares, Liberty Media intends to take action as soon as practicable to cause the nomination and election of persons to Sirius' Board of Directors such that a majority of the persons serving on the Sirius Board of Directors will be persons nominated by Liberty Media. Liberty Media intends to vote all of its shares of common stock in favor of its nominees and to solicit proxies from other Sirius shareholders in support of the election of those nominees." Petition at 15; Troyer Dec. 2 at ¶¶6-8.

shares represent a substantially greater percentage of its outstanding shares.[4] The number of Sirius shares to be acquired through the forward purchase is new and material information.

Second, Sirius argues that "Liberty Media's recent open-market purchase of Sirius XM common shares may be new, but is not material" because the 60 million shares that Liberty Media purchased represent "only 1.6% of the current outstanding common stock" of Sirius. Opp. at 5. However, these and the forward purchase shares constitute 9.57% of the currently outstanding common shares of Sirius, making Liberty Media the largest single holder of Sirius common shares even before it converts any of its Preferred Shares. Moreover, Liberty Media's commitment to spend over $750 million to acquire these additional common shares of Sirius is directly relevant to the issue raised in the Bureau Decision regarding whether Liberty Media intends "to take actions" to exert *de facto* or *de jure* control over Sirius.[5]

Finally, Sirius argues that "Liberty Media's declaration that it intends 'to assert control over' Sirius XM cannot justify reconsideration because it is not new." Opp. at 5. However, Sirius had argued repeatedly that the Liberty Media applications do not evidence "any plans by Liberty Media to take the actions necessary to acquire control of Sirius XM" and that Liberty Media "does not have any present intention of exercising control" over Sirius. *See, e.g.,* Sirius Petition to Deny at 9; Reply of Sirius XM Radio, Inc., April 12, 2012, at 5-6. Moreover, the new information provided in the Petition responds directly to the erroneous

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[4] In its Opposition at 5, n.12, Sirius states that there are 3,788,436,591 outstanding shares of Sirius XM common stock. Thus, the 302,198,700 forward purchase shares comprises 7.97% of Sirius' outstanding common shares -- not the unexplained "4% equity interest in Sirius XM" claimed by Sirius in its Opposition at 4. Upon the conversion of 49.9% of Liberty Media's Preferred Shares, the forward purchase shares will comprise 5.95% of Sirius' then outstanding common shares.

[5] Sirius acknowledged in its Petition to Dismiss or Deny the Liberty Media applications that the expiration of the contractual restrictions in the 2009 Investment Agreement enables Liberty Media to take further "actions to acquire control of Sirius XM, should it eventually decide to do so – *such as purchasing additional shares.*" Sirius Petition to Dismiss or Deny, filed March 30, 2012 ("Sirius Petition to Deny") at 2 (emphasis added). Sirius cannot now reasonably argue that Liberty Media's purchase of additional shares is not "material" to its intent to assert control over Sirius.

conclusion in the Bureau Decision that Liberty Media had not demonstrated that it "intends to take actions, such as conversion of preferred to common stock and installation of a board majority, that would constitute exercise of *de facto* or *de jure* control over Sirius." *Bureau Decision* at 3. Although Liberty Media believed that its intent to assert *de facto* control was evident from (and as Sirius now concedes in its Opposition at 6 "was the impetus for") its applications, Sirius had argued that Liberty Media's intent was not sufficiently clear to warrant a waiver of the application filing rules and acceptance of the Liberty Media applications. Consequently, Liberty Media has provided new and material information making clear its ability and intent to control Sirius.

II. Liberty Media Is Not Required to State Precisely How and When It Will Exercise *De Facto* Control Over Sirius.

Faced with these specific and compelling additional facts and clear statement of intent, Sirius seeks to impose new requirements upon Liberty Media, claiming that it must disclose a specific time table and methodology for exercising *de facto* control and identify its proposed slate of directors. Thus, Sirius argues that Liberty Media "still has not stated ***definitively*** that it will convert its shares of Sirius XM preferred stock, initiate a proxy contest, or conduct open market purchases" and has not "provided a firm indication of ***when*** it might pursue any such actions." Opp. at 2 (emphasis added). Sirius contends that Liberty Media's applications "relied on the fact that Liberty Media's preferred stock, once converted, would constitute a 40 percent share of Sirius XM's common stock and, thus, would give it effective control" over Sirius, and that "[t]he Bureaus correctly rejected this '40 is the new 50' argument." Opp. at 10. Sirius admits that Liberty Media has stated that it intends to convert approximately one-half of its Preferred Shares and as a result, together with the common shares that it already

owns and has committed to purchase, "Liberty Media will have a 32% unrestricted stake" in Sirius. Opp. at 9-10. Sirius contends that the Bureau Decision previously rejected the "40 is the new 50" argument and must now reject the "32 is the new 50" argument. *Id.* at 10.[6]

The Commission has determined that a substantial minority shareholder has the ability to exert *de facto* control over a publicly traded licensee whose common stock otherwise is widely held. Prior to consummating an agreement by which it would obtain a 34% equity interest in DIRECTV, News Corporation ("News Corp.") was required to obtain Commission consent to the transfer of *de facto* control.[7] The Commission specifically stated that, as a result of the proposed transaction, News Corp. would hold "the single largest block of shares in Hughes, ***thus providing News Corp. with a de facto controlling interest*** over Hughes and its subsidiaries, including DIRECTV Holdings, LLC." *News Corp. Order* at ¶2 (emphasis added). Likewise, the Commission stated that its approval of applications for transfer of *de facto* control was "necessary to permit consummation of the Share Exchange Agreement between Liberty Media and News Corp." pursuant to which "Liberty Media will have a 40.36% interest in DIRECTV, making it the largest stockholder by far."[8] In that case, the Commission again expressly stated that "**[b]y *virtue of this interest*,** Liberty Media will have *de facto* control over DIRECTV." *Liberty Media-DIRECTV Order* at ¶2 (emphasis added). In each case, the transaction at issue was the acquisition of a minority equity interest large enough to confer upon its holder the ability to exercise *de facto* control over the licensee because the

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[6] Contrary to Sirius' contention, the Bureau Decision did not conclude that Liberty Media's ownership interest was insufficient to confer *de facto* control, but rather that Liberty Media had not sufficiently demonstrated its intent to use that interest to assert control over Sirius. Bureau Decision at 3.

[7] *General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corporation Limited, Transferee,* 19 FCC Rcd. 473 (2004) ("*News Corp. Order*").

[8] *News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control*, 23 FCC Rcd. 3265 (2008) ("*Liberty Media-DIRECTV Order*"), at ¶2.

remainder of the outstanding common stock was widely held. In arguing that "those cases did not involve an independent analysis of *de facto* control and are distinguishable from the present circumstances," Sirius simply ignores these clear statements to the contrary. Opp. at 8, n.27.

The Bureau Decision plainly did not adopt Sirius' argument, but rather distinguished the *News Corp.* and *Liberty Media-DIRECTV Orders* on the grounds that those cases "do not involve, as here, unconverted rights with respect to voting for directors." *Bureau Decision* at 3, n.8. Consequently, Sirius also argues that because Liberty Media currently "has only unconverted rights to vote" for directors elected by the common shareholders, it is not currently "in a position to assert *de facto* control" over Sirius and its applications should not be considered. Opp. at 8, n.27. In the *News Corp.* and *Liberty Media-DIRECTV* cases, the proposed transferee had ***no*** equity interest in the licensee and ***no*** right to vote for directors at the time it filed its applications seeking Commission consent to the transfer of *de facto* control.

Moreover, in neither case was the proposed transferee required to provide a detailed plan of how it intended to assert its control over the licensee, or to demonstrate whether or how it intended to obtain a controlling number of seats on the Board of Directors of the licensee or its parent company,[9] once the Commission granted the applications for consent to transfer of control and the proposed transaction was consummated. Yet Sirius argues that, in addition to stating its intent to convert Preferred Shares giving it an equity interest in Sirius commensurate with those found to constitute *de facto* control in the *News Corp.* and *Liberty Media-DIRECTV Orders,* Liberty Media also must spell out exactly what it intends to do once

[9] In fact, in the *News Corp. Order*, the Commission specifically noted that the post-transaction DIRECTV Board would be comprised of 11 members, 6 of whom are independent, and that "there is no corporate governance mechanism that ensures that News Corp. will continue to have four representatives on the board, or that Mr. Murdoch and Mr. Carey will continue to hold the position of Chairman and CEO, respectively." *News Corp. Order* at ¶14 and n.45.

it converts its Preferred Shares and when it intends to do it. Opp. at 9-12.

Although Liberty Media believes that it clearly has stated its plan to assert *de facto* control over Sirius, Liberty Media further states that it currently plans to convert approximately 49.9% of its Preferred Shares within 20 days after the Commission grants its applications. *See* Supplemental Declaration of Craig Troyer at ¶2. Thereafter, "Liberty Media intends to take action as soon as practicable to cause the nomination and election of persons to Sirius' Board of Directors such that a majority of the persons serving on the Sirius Board of Directors will be persons nominated by Liberty Media." Troyer Dec. 2 at ¶8. When and how Liberty Media will replace and/or expand the Sirius Board of Directors will depend upon when the Commission approves Liberty Media's applications.[10]

Thus, Liberty Media already has: (a) Preferred Shares equal to 40% of the outstanding common stock of Sirius and it has acquired or has committed to acquire additional common shares equal to 9.57% of the outstanding common shares (6.2% after conversion of all Preferred Shares); (b) the right to vote ***all*** of its Preferred Shares on all matters voted upon by the common shareholders, except the election of directors; (c) the right to convert its Preferred Shares in its discretion at any time; and (d) five of 13 seats on the Sirius board of directors. Further, upon conversion of 49.9% of its Preferred Shares, with its additional purchased shares, Liberty Media will have nearly 200,000,000 more votes than the *total* number of common shares voted (both for and against) any Sirius director in each of the past three annual elections. *See* Petition at 12-15.

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[10] For example, for elections of directors at Sirius' annual meeting, the Sirius' Bylaws require that notice to nominate persons for election to the Sirius Board of Directors be given no more than 90 days and no less than 70 days before the anniversary of the prior year's annual meeting if occurring at or about the same time of year. Sirius' latest annual meeting occurred on May 22, 2012. Other procedures would apply depending upon whether Liberty Media sought to assert control through shareholder consent or a special meeting of shareholders.

Because conversion of even half of its Preferred Shares, coupled with the restrictions on Sirius' activities in the Certificates of Designation, [11] would place Liberty Media in a more dominant position vis-à-vis Sirius than News Corp. and Liberty Media were vis-à-vis DIRECTV (again, by far the largest single common shareholder), Liberty Media filed applications seeking Commission consent to the transfer of *de facto* control prior to converting any of its Preferred Shares and asserting *de facto* control over Sirius. If Sirius is correct and the conversion of Liberty Media's Preferred Shares does not implicate Section 310(d), the Commission should state that Liberty Media is free to convert any and all of its Preferred Shares without further approval of the Commission, and Liberty Media will proceed accordingly.[12]

III. The Modified Short-Form Proxy Contest Procedures Are Inapplicable.

Sirius argues that Liberty Media's intent to "conduct an unspecified proxy contest at some future time" is not "enough to warrant FCC review," and that Liberty Media has not complied with the Commission's *Policy Statement on Tender Offers and Proxy Contests,* 59

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[11] By converting approximately half of its Preferred Shares, Liberty Media will be by far the single largest shareholder of Sirius while maintaining all of the protections and restrictions on Sirius' activities under the Certificate of Designations governing the Preferred Shares. *See* Certificate of Designations regarding the Series B-1 Preferred Shares issued to Liberty Media, a copy of which is attached as Exhibit 2 to Declaration of Craig Troyer, dated April 12, 2012, at Section 12.

[12] Sirius also argues that "Liberty Media appears to have told the press more about its plans than the Commission," citing a CNBC interview with Liberty Media's CEO, Greg Maffei. Opposition at 2-3, 12. However, Sirius failed to include in its Opposition the portion of the interview in which Mr. Maffei was asked directly about the purpose of Liberty Media's petition for reconsideration at the Commission. Mr. Maffei explained that Liberty Media was seeking Commission consent to the transfer of *de facto* control of Sirius in order to get the ability "to exercise the rights that we have" by virtue of its ownership of Preferred Shares that are no longer subject to voting and other conduct restrictions. Subsequently, Mr. Maffei was asked about Liberty Media's longer term interest in Sirius, and he stated that Liberty Media was "not in a rush to make any decisions" on that issue, but might "go into hard control" of Sirius by acquiring more than 50% of the outstanding common shares. Contrary to Sirius' characterization in its Opposition, Liberty Media has informed the Commission that it might purchase additional common shares of Sirius such that it would hold more than 50% of the outstanding common shares upon conversion, and would amend the applications to seek consent to the transfer of *de jure* control in that event. *See, e.g.,* Petition at 16; Troyer Dec. 2 at ¶9. Mr. Maffei also stated that ultimately Liberty Media might pursue a transaction to facilitate a tax-free distribution of the interest in Sirius to Liberty Media's shareholders, but there was "no set timetable" for that decision.

RR 2d 1536 (1986) ("*Tender Offer Policy Statement*"). Opp. at 8, 10-11, nn.26, 38. Liberty Media has demonstrated that, after conversion of only one-half of its Preferred Shares, it will have nearly 200,000,000 more votes than were cast (for and against) any Sirius director in each of the past three elections, effectively determining the outcome of any "proxy contest." In any event, the Tender Offer Policy Statement provides for modified short-form application procedures for proxy contests that do not involve "changes in ownership and voting rights." *Tender Offer Policy Statement*, 59 RR2d 1536 at n.64, *citing Storer Comm., Inc. v., FCC,* 763 F.2d 436, 441 (D.C. Cir. 1985) ("In its affirmance, the court expressly approved our determination that the existence of changes in ownership and voting rights 'is a major factor in determining whether a substantial change has occurred'" requiring long-form application procedures).

Here, elimination of the contractual restrictions on Liberty Media's exercise of its ownership and voting rights, combined with the conversion of Preferred Shares to common shares, appears to render the modified short-form application procedures set forth in the Tender Offer Policy Statement inapplicable to Liberty Media's applications. However, if the Commission confirmed that the expiration of the Investment Agreement restrictions and conversion of Liberty Media's shares is not such a "change in ownership and voting rights," Liberty Media would pursue a proxy contest, if necessary, under the procedures in the Tender Offer Policy Statement.

IV. Sirius' Original Petition to Dismiss Was Procedurally Defective and Its Interpretation of Section 310(d) Would Deny Administrative Due Process to Liberty Media.

Sirius seeks to avoid the procedural defects in its Petition by arguing that Section 25.154 permits consideration of its Petition as "an informal objection" and that no

affidavit was necessary because the facts "are not in dispute." Opp. at 7. However, Section 25.154 has no application to the Office of Engineering and Technology or Wireless Telecommunications Bureau transfer applications filed by Liberty Media.[13] In addition, Sirius included in its Petition numerous factual statements that are neither undisputed nor supported by affidavit. *See, e.g.*, Sirius Petition to Deny at 9 (Liberty Media "lacks the ability to direct the Company's management or operations" and "the Investment Agreement was carefully negotiated to ensure that Liberty Media would not be in control of Sirius XM and would not gain control upon expiration of the Investment Agreement Provisions"); *Id.* at 15 ("Liberty Media...lacks any ability to dominate Sirius XM's corporate affairs").

In response to Liberty Media's claim that Sirius' interpretation of the Section 310(d) filing requirements would deny administrative due process to Liberty Media, Sirius contends that Section 310(d) is inapplicable here because "a showing of *de facto* control must rely on facts and events that have occurred" already, not on "speculation as to what might occur in the future." Opp. at 7-8. The Commission clearly cannot enforce a statutory obligation to obtain prior approval of transfers of control by requiring the applicant to first unlawfully exercise such control in order to file the required applications.

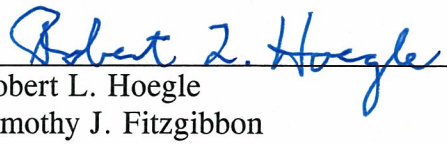
Conclusion

Because Liberty Media's Petition for Reconsideration provides new and material information demonstrating that it has the ability and intent to assert control over Sirius, the Petition should be granted and the Liberty Media applications should be accepted for filing and placed on public notice.

[13] Sirius "cannot evade the procedural requirements" of the FCC's Rules by concurrently requesting relief under the FCC's informal procedures. *See, e.g., Paging Systems, Inc.*, 21 FCC Rcd. 7225 (WTB 2006), at ¶8.

Respectfully submitted,

LIBERTY MEDIA CORPORATION

BY: 

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June 21, 2012

CERTIFICATE OF SERVICE

I, Robert L. Hoegle, do hereby certify that copies of the foregoing Reply to Opposition to Petition for Reconsideration of Dismissal of Applications for Consent to Transfer of *De Facto* Control and Supplemental Declaration of Craig Troyer in Support of Petition for Reconsideration of Dismissal of Applications for Consent to Transfer of *De Facto* Control were served by first class U.S. mail, postage prepaid, this 21st day of June, 2012 on the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Application of	IBFS File Nos. SES-STA-20120320-00280
	SES-STA-20120320-00281
Liberty Media Corporation	SES-STA-20120320-00282
	SAT-STA-20120320-00053
For Consent to Transfer of *De Facto*	SAT-STA-20120320-00054
Control of Sirius XM Radio Inc.	SAT-STA-20120320-00055
	SAT-STA-20120320-00056
	ULS File Nos. 0005137812 and 0005137854
	Experimental License File Nos. (TBD)

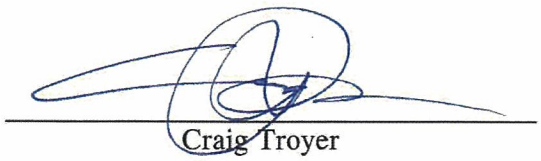
SUPPLEMENTAL DECLARATION OF CRAIG TROYER IN SUPPORT OF PETITION FOR RECONSIDERATION OF DISMISSAL OF APPLICATIONS FOR CONSENT TO TRANSFER OF *DE FACTO* CONTROL

Craig Troyer hereby declares, upon knowledge and information, that:

1. I am the Deputy General Counsel of Liberty Media Corporation ("Liberty Media") and am submitting this supplemental Declaration to the Federal Communications Commission in support of Liberty Media's Petition for Reconsideration of the dismissal of Liberty Media's applications seeking Commission consent to the transfer of *de facto* control of Sirius XM Radio Inc. ("Sirius") to Liberty Media.

2. Liberty Media presently plans on converting 49.9% of its Preferred Shares within 20 days after the Commission approves its applications for transfer of *de facto* control of Sirius.

3. I certify under penalty of perjury that the foregoing is true and correct.



Craig Troyer

June 21, 2012