Before the
Federal Communications Commission
Washington, DC 20554

Application of	)	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
Liberty Media Corporation	)	
For Consent to Transfer of *De Facto* Control of Sirius XM Radio Inc.	)	
	)	ULS File Nos. 0005137812 and 0005137854
	)	
	)	Experimental License File Nos. 0011-EX-TU-2012 and 0012-EX-TU-2012

REPLY OF SIRIUS XM RADIO INC.

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REPLY OF SIRIUS XM RADIO INC.

Sirius XM Radio Inc. ("Sirius XM" or "the Company") hereby submits its Reply to the Opposition filed by Liberty Media Corporation ("Liberty Media") on April 12, 2012 (the "*Opposition*"). The *Opposition* and Liberty Media's underlying Application for Consent to Transfer of *De Facto* Control (the "*Application*")[1] ask the Commission to pre-approve some future, hypothetical action by which Liberty Media may (or may not) seek to take control of Sirius XM's FCC licenses. For the reasons stated herein, and in Sirius XM's previously-filed Petition to Dismiss or Deny,[2] the Commission should find Liberty Media's request contrary to agency rules and precedent and dismiss or deny the *Application*.

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1 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. 0011-EX-TU-2012 and 0012-EX-TU-2012 (filed Mar. 20, 2012).

2 Sirius XM, Petition to Dismiss or Deny (filed Mar. 30, 2012) (the "*Petition*").

I. INTRODUCTION AND SUMMARY

The *Opposition*, like the *Application*, presents no actual facts or concrete proposal for Commission review. It instead presents a laundry list of potential scenarios that Liberty Media may use in the future to take control of Sirius XM. Liberty Media still has not revealed any particular action that it would take if the Commission were to process and grant the *Application*. Indeed, as in the *Application*, the *Opposition* is devoid of any plan at all. This is a fatal deficiency because the Commission does not and should not review hypothetical applications.

Liberty Media's suggestion that a further plan of action is unnecessary because its minority interest is actually controlling—in essence that "40 is the new 50"—ignores consistent agency *de facto* control precedent focused on Board composition, management and operational decision-making, in addition to stockholding. There is no support for the remarkable proposition that a now unrestricted 40% minority interest, standing alone, is sufficient to bestow control of a public company. An unbroken line of FCC cases holds precisely the opposite: in determining *de facto* control, the Commission must review all of the facts and no single factor is ever dispositive. The Sirius XM Board's decision not to support the *Application* conclusively demonstrates that, absent further action, Liberty Media's 40% interest does not amount to *de facto* control.

Liberty Media's reliance on general stockholder voting statistics to claim *de facto* control based on its 40% ownership is specious. The FCC cannot foretell a change of control based on the uncertain prospect that a minority stockholder could cast the majority of votes in some unscheduled election. Any such future proxy contest by Liberty Media might well be rejected by a majority of Sirius XM's stockholders.

The crux of Liberty Media's argument for filing the *Application* now is that the 2009 Investment Agreement no longer restricts it from pursuing control of Sirius XM. The mere

expiration of this restriction does not mean the FCC should grant blanket authority for Liberty Media to take some unspecified future action. Commission precedent uniformly holds that the agency can discharge its statutory duty to ensure that a transfer of control serves the public interest, convenience, and necessity only by reviewing specific facts and the applicant's concrete plans to assume control, and not by speculating about what might and might not happen.

Moreover, procedural infirmities require dismissal of Liberty Media's application. Liberty Media still has not met its burden to provide good cause to waive the agency's basic filing requirements. The Commission promptly should dismiss or deny the *Application*.

II. THE COMMISSION SHOULD DISMISS LIBERTY MEDIA'S APPLICATION BECAUSE IT PROFFERS HYPOTHETICALS NOT FACTS.

The Commission has made clear that it does not review hypothetical applications. The agency has repeatedly emphasized that "a showing of *de facto* control must rely on facts and events that have occurred and not speculation as to what might occur in the future."[3] In reviewing any application for transfer of control, the agency considers the specific transaction and evidence before it, not the possibility of some future action that might result in transferring

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[3] *See, e.g., American Mobile Radio Corp.*, Memorandum Opinion and Order, 16 FCC Rcd. 21431, ¶ 11 (2001) (citing *Fox Television Stations, Inc.*, 10 FCC Rcd. at 8516-17, ¶ 160 (1995)), *aff'd sub nom., Primosphere Ltd. P'Ship v. FCC*, 2003 WL 472239 (D.C. Cir. Feb. 21, 2003); *Mr. William S. Paley, CBS Inc.*, Letter, 1 FCC Rcd. 1025, 1025-26 (1986) ("Unlike a *de jure* transfer of control, where the mere potential to exercise majority vote requires prior Commission consent and in which an abstention from any activity evidencing control or influence does not excuse noncompliance, a finding that a *de facto* transfer of control has occurred depends largely upon a review of the actual operation of the licensee—not upon the potential for some hypothetical future exercise of control.") ("*CBS*"); *see also Una Vez Mas Texas Holdings*, 25 FCC Rcd. 13409, 13414-15 (2010) (analysis of *de facto* control based on the record, not "speculation"); *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, Initial Authorization, 19 FCC Rcd. 22612, 22641 (2004) ("The Commission has previously determined that a finding that a *de facto* transfer of control has occurred depends largely upon a review of the actual operation of the licensed station - not upon the potential for some hypothetical exercise of control.").

control.[4] This unwavering approach is consistent with, and driven by, the FCC's statutory mandate to consider not just the qualifications of the proposed licensee, but also the form of control and the nature of the transaction to determine whether the application will serve the public interest, convenience, and necessity.[5] As the applicant, Liberty Media bears the burden of providing all the necessary facts to prove the occurrence of a *de facto* transfer of control.[6]

Neither the *Application* nor the *Opposition* imparts any facts demonstrating how, when, or even *if* Liberty Media will move to acquire *de facto* control of Sirius XM. Instead, Liberty Media catalogs the various ways in which any entity *might* take control of a public corporation, including: entering into a merger, acquisition, asset sale, or other business combination; seeking to control the management, Board of Directors or policies; joining a "group" with respect to the voting of securities; calling a meeting of stockholders; initiating a stockholder proposal;

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4 *Lorain Journal Co. v. FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965) ("[W]hether a proposed transaction would result in a transfer of control . . . should be resolved *by bringing the complete facts of the proposed transaction to the Commission's attention* for a ruling in advance of any consummation of the transaction.") (emphasis added); *see also Petition of Turner Broadcasting System*, 101 FCC 2d 843, 849 (1985) ("an option . . . does not enter into transfer-of-control determinations until the option is exercised.").

5 *See* 47 U.S.C. § 310(d) (providing that no license "shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby"); *see generally WHW Enters., Inc. v. FCC*, 753 F.2d 1132, 1139 (D.C. Cir. 1985) ("The Commission . . . relies heavily on the completeness and accuracy of the submissions made to it. Thus, applicants have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate.") (internal citations and punctuation omitted).

6 *See, e.g.*, *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, Memorandum Opinion and Order, 27 FCC Rcd. 497, 500(2012) ("*Insight Communications*") ("Applicants bear the burden of pro[of]" in a license transfer application); *Applications of CNCA Acquisition Corp.; For Commission Consent to a Transfer of Control of American Cellular Network Corp.*, 3 FCC Rcd. 6088 ¶ 24 (1988) (stating that "the primary interest in the prosecution of these applications lies with [the applicant]").

soliciting proxies; or purchasing additional shares.[7] But Liberty Media does not indicate an intention to take any of these actions. To the contrary, Liberty Media's Schedule 13D filing with the U.S. Securities and Exchange Commission reports no such plans.[8] Because Liberty Media has not filed an amendment to the Schedule 13D, Liberty Media presumably still does not have any present intention of exercising control.[9]

Liberty Media contends that approval of the *Application* would be appropriate now simply because the expiration of the Investment Agreement restrictions means that it "*can* take actions that 'could ultimately result in a transfer of control.'"[10] As Sirius XM explained in the *Petition*, potential steps are not the same thing as real actions.[11] Just because Liberty Media is no longer contractually forbidden from attempting to take control of Sirius XM does not mean that

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7 *See Opposition* at 8-9.

8 *See* Liberty Media, General Statement of Acquisition of Beneficial Ownership (Schedule 13D) (Sept. 23, 2011) (". . . [Liberty Media] has no present plans or proposals that relate to or would result in: (a) The acquisition by any person of additional securities of [Sirius XM], or the disposition of securities of [Sirius XM]; (b) An extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving [Sirius XM] or any of its subsidiaries; (c) A sale or transfer of a material amount of assets of [Sirius XM] or of any of its subsidiaries; (d) Any change in the present board of directors or management of [Sirius XM], including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board; (e) Any material change in the present capitalization or dividend policy of [Sirius XM]; (f) Any other material change in [Sirius XM]'s business or corporate structure; (g) Changes in [Sirius XM]'s charter, bylaws or instruments corresponding thereto or other actions which may impede the acquisition of control of [Sirius XM] by any person; (h) A class of securities of [Sirius XM] being delisted from a national securities exchange or ceasing to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association; (i) A class of equity securities of [Sirius XM] becoming eligible for termination of registration pursuant to Section 12(g)(4) of the Act; or (j) Any action similar to any of those enumerated in items (a)-(i) above.").

9 Rule 13d-2 of the Securities Exchange Act requires a 13D filer to amend its current Schedule 13D should a material change occur in the facts set forth in its filing.

10 *Opposition* at 11 (emphasis added).

11 *Petition* at 19-20.

it *has* taken control of Sirius XM, or even that it *will* try to take control of Sirius XM.[12] Liberty Media's request calls for precisely the type of "speculation as to what might occur in the future" that the FCC has consistently rejected in determining whether there is a *de facto* transfer of control, and the agency should not depart from its traditional and well-founded practice in this circumstance.[13]

Liberty Media suggests the statutory requirement for FCC approval before completing a transfer of control entitles it to receive the agency's blessing for some undisclosed future action that ultimately *might* yield *de facto* control of Sirius XM. But Liberty Media cites no case where the Commission has ever issued this kind of "blank check" endorsing an indeterminate event. The prior approval requirement in Section 310(d), upon which the *Opposition* relies, requires the FCC to review a specific proposed transaction and find it in the public interest before that transaction can be consummated.[14] In this case, it is entirely unknown what action Liberty Media would "consummate" within the 60 day deadline following any FCC approval.[15] Nothing in the Communications Act requires, or even authorizes, the agency to bless some unspecified action that an applicant might choose to pursue. The primary case relied upon by Liberty Media to interpret Section 310(d), *Lorain Journal Co. v. FCC*, requires an applicant to "bring[] the

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[12] In fact, Liberty Media did not submit a proposal for the next Sirius XM annual stockholder meeting in May 2012 by the deadline.

[13] Liberty Media's assertion that the FCC will refuse to consider hypothetical events only in third-party complaints of unauthorized transfers is baseless. *Opposition* at 20. The *Opposition* cites no case where the FCC considered a hypothetical event in determining *de facto* control.

[14] *See Opposition* at 8 (citing 47 U.S.C. § 310(d)).

[15] 47 C.F.R. § 25.119(f) ("Assignments and transfers of control shall be completed within 60 days from the date of authorization. Within 30 days of consummation, the Commission shall be notified by letter of the date of consummation and the file numbers of the applications involved in the transaction.").

complete facts of the *proposed transaction* to the Commission's attention."[16] This is consistent with the Commission's decades-long, unbroken history of requiring parties to proffer concrete plans for actual transfers.[17]

Furthermore, if Liberty Media's unstated plan involves some sort of hostile takeover, it has not followed the Commission's established Policy Statement on Tender Offers and Proxy Contests.[18] This process would have allowed Liberty Media to comply with the statutory requirement for prior approval by establishing an interim voting trust to hold its interest in Sirius XM while the agency passed on Liberty Media's full application for *de facto* control.[19] Potential FCC licensees have regularly used voting trusts to effect a transfer of control before the completion of the statutory comment period and the deadline for reconsideration.[20] The fact that

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16 351 F.2d 824, 830 (D.C. Cir. 1965) (citing *Public Notice on Procedure of Transfer and Assignment of Licenses*, 4 R.R. 342 (1948)) (emphasis added).

17 The FCC has stated that "a realistic definition of [the word 'control'] includes any ***act*** which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." *See* Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277, 295-296 (1991) (quoting *Powel Crosley, Jr.*, 11 FCC 3, 20 (1945)) (emphasis added); *Insight Communications* ¶ 6 (describing "the terms of the proposed transaction"); *Applications of AT&T Inc. and Deutsche Telekom AG*, Order, 26 FCC Rcd. 16184 ¶ 49 & n.146 (2011) (considering the competitive effects of "[t]he proposed transaction").

18 *See Tender Offers and Proxy Contests*, Policy Statement, 59 Rad. Reg. 2d 1536 (1986), *appeal dismissed sub nom. Office of Commc'n of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987) ("*Tender Offer Policy Statement*"); *see also In re Applications of QVC Network, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd. 8485 ¶ 4 (1993) (recognizing use of procedure described in policy statement in "past tender offers involving target communications corporations"). Liberty Media is certainly aware of the FCC's Policy Statement because it cites to the statement multiple times in the *Opposition*. *See Opposition* at 8-9.

19 *See Tender Offer Policy Statement* ¶ 35.

20 *See Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025, ¶ 4 n.11 (1998) (describing WorldCom's use of a voting trust in its initial application); *Applications of L.P. Media, Inc. and G. William Miller,* Trustee, 102 FCC 2d 1276 (1985); *Applications of One Two Corporation and Eugene McCarthy, Trustee*, Memorandum Opinion and Order, 58 Rad. Reg. 2d 924 (1985).

Liberty Media has disregarded this procedural option raises doubt about whether it really intends to take hostile action to gain control of Sirius XM. Liberty Media seeks regulatory approval for the equivalent of an option to acquire control at some unspecified point in the future and under some unspecified circumstances. Such a gambit must fail because, absent an actual transaction that would yield control, there is nothing for the Commission to review.[21]

III. LIBERTY MEDIA SEEKS TO REWRITE THE FCC'S TEST FOR CONTROL TO FOCUS SOLELY ON THE NUMBER OF SHARES OWNED.

A. Liberty Media's Single-Minded Focus On Minority Ownership Cannot Be Reconciled With Decades Of FCC Precedent.

Liberty Media's only attempt to link its control theory to actual facts, rather than speculative future actions, is a claim that its unrestricted 40% stock interest is sufficient, standing alone, to give it *de facto* control.[22] Yet, FCC precedent is clear and unwavering—the *de facto* transfer of control analysis "must of necessity transcend formulas, for it involves an issue of fact which must be resolved by the special circumstances presented."[23] No single factor is

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[21] Indeed, Liberty Media's *Application* should be dismissed as defective because it omits required information. 47 C.F.R. § 25.112. As the FCC has stated, "pleadings inconsistent with the Commission's procedural rules waste the resources of the Commission and other parties to a proceeding." *State of Indiana and Sprint Nextel Corp.*, Order on Reconsideration, 26 FCC Rcd. 5067, ¶ 7 (PSB 2011); *see also Maritime Communications/Land Mobile, LLC*, Order to Show Cause, 26 FCC Rcd. 6520, ¶ 43 (2011) (holding that an applicant providing "piecemeal and selective" information "wasted precious Commission resources").

[22] *See Opposition* at 11 ("Commission precedent demonstrates that the 40% shareholder of a publicly traded company, unconstrained by statutory or contractual limitations, is able to exert *de facto* control over that company when the remainder of its stock is widely held."). As discussed *infra*, the "Commission precedent" upon which Liberty Media relies does not support the remarkable proposition that a large percentage of minority ownership, standing alone, amounts to *de facto* control.

[23] *Stereo Broadcasters, Inc.*, Memorandum Opinion and Order, 55 FCC 2d 819, 821 (1975), *aff'd on other grounds*, 652 F.2d 1026 (D.C. Cir. 1981); *see also Lockheed Martin Corp. Regulus LLC and Comsat Corp.*, Memorandum, Order and Authorization, 14 FCC Rcd. 15816, ¶ 30 (1999), *vacated in part on other grounds*, *PanAmSat Corp. v. FCC*, Nos. 99-1384, 1385, 2000 WL 621421 (D.C. Cir. Apr. 20, 2000) ("*Comsat*"); *Univision Holdings, Inc. (Transferor) and Perenchio Television, Inc. (Transferee)*, Memorandum Opinion and Order, 7 FCC Rcd. 6672 ¶ 15 (1992) ("*Univision Holdings, Inc.*"); *CBS* at 1025 (1986) ("[T]here is no precise formula by which control may be ascertained." (quoting *Tender Offer Policy Statement* at ¶ 10)); *News*

dispositive, and the Commission has expressly and repeatedly "rejected a formulistic approach based on a particular level of minority holdings in its *de facto* control analyses."[24]

Liberty Media's single-minded focus on its unrestricted 40% interest in Sirius XM ignores all of the other factors that the Commission has said are critically important, such as Board composition, management, and control of operations. As noted in the *Petition*, Liberty Media holds only 5 of 13 seats on the Sirius XM Board of Directors (and, in order to vote its 40% interest in Sirius XM in a general election of directors, Liberty Media would be required to convert its Preferred Stock to common stock, thus forfeiting its right to proportional representation on the Board of Directors and its other significant minority protection rights). The CEO and Chairman of the Board are independent of Liberty Media and have a relationship with Sirius XM predating Liberty Media's investment and acquisition of a minority interest in the Company. Liberty Media is not engaged in Sirius XM's programming or other operational decisions. And, none of these factors changed upon expiration of the standstill provisions in the Investment Agreement.[25]

Liberty Media's reliance on general stockholder voting statistics to claim *de facto* control based on its 40% ownership interest is specious.[26] The number of stockholders historically voting for any given matter is not an appropriate metric for forecasting the percentage of

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International, PLC, Memorandum Opinion and Order, 97 FCC 2d 349 ¶ 16 (1984) ("*News Int'l*").

24 *By Direction Letter Regarding Control of CBS Inc.*, Memorandum Opinion and Order, 2 FCC Rcd. 2774 ¶ 4 (1987) ("*CBS II*").

25 To the extent Liberty Media claims the *Application* is necessary due to the expiration of the standstill provisions and the need to comply with the Commission's prior approval requirement, it is at least six months too late. Assuming adherence to the FCC's informal 180-day "shot clock," Liberty Media would have needed to submit the *Application* no later than September 6, 2011.

26 *See Opposition* at 14-17.

stockholders who would vote in an extraordinary contest for control of a corporation. Recognizing the inherent difficulty, if not impossibility, of predicting the results of a proxy challenge, the FCC has declared "conjecture about the outcome of possible proxy battles is not a basis for determining control."[27]

More appropriately, the FCC holds consistently that a minority stockholder has "significant influence" but not control because 60% could outvote 40%.[28] This is a critical distinction: while a controlling party can unilaterally implement policies and direct corporate operations, an influential party must convince an independent board and/or independent stockholders to follow its lead or, at the very least, to refrain from opposing it.[29] The FCC has held that "[t]he influence must be to the degree that a minority shareholder is able to 'determine' the licensee's policies and operation" before it rises to the level of a transfer of control.[30] Liberty Media's radical claim that it has control based solely on its 40% ownership stake and the expiration of certain of the Investment Agreement provisions founders on this point. It may well be able to influence decisions that Sirius XM makes but, without the acquiescence of a majority of Sirius XM's stockholders (which it does not have), there is simply no way it can "determine"

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27 *CBS II* at ¶ 4.

28 *Comsat* ¶ 31; *see also Sprint Corp.*, Petition for Declaratory Ruling, 11 FCC Rcd. 1850 ¶ 25 (1996) ("*Sprint Corp.*"); *Request of MCI Communications Corp. British Telecommunications PLC*, Joint Petition for Declaratory Ruling, 9 FCC Rcd. 3960 ¶ 14 (1994) ("*MCI/BT*").

29 *See Tender Offer Policy Statement* ¶ 15 (no transfer of control where challenging party obtains a result "by virtue of the persuasiveness of [its] arguments rather than by the power of [its] ownership interest[]").

30 *News Int'l* ¶ 16; *MCI/BT* ¶ 11 ("A minority shareholder does not necessarily control a corporation unless it exercises influence to a degree that 'determines' the company's policies and operations, or 'dominates' the company's corporate affairs. Thus, the facts of a particular situation (e.g., who has the power to direct the company's operations, who determines the makeup of the Board of Directors), are relevant to determining who controls the company."); *see also Sprint Corp.* ¶ 20.

them. In fact, were Liberty Media to convert its Preferred Stock to common stock in order to vote in a general election of directors, there is no guarantee that Liberty Media would succeed in electing any directors.

Accepting Liberty Media's argument that "40 is the new 50"—meaning that positive control of a widely-held company is established when one entity acquires an unrestricted 40% of the shares—also could have serious practical implications. Conveying control to a single minority stockholder would diminish stockholder value and contravene the agency's stated policy of protecting the interests of all stockholders.[31] Moreover, adopting Liberty Media's proposal would have wide and unpredictable consequences for any Commission licensee with a significant minority investor. The FCC's long-standing policy, which looks to all indicia of control, is well understood by the industry. The totality of the circumstances analysis provides leeway for investors to purchase minority stakes in licensees without being concerned that such an investment, standing alone, would result in *de facto* control. Endorsing Liberty Media's single-factor test would upend these expectations. This is particularly true because Liberty Media's proposed standard does not contain a limiting principle. Its calibration of minority stockholder control would appear to extend to non-majority stakes well below 40%, so long as the remainder of the stock is widely held. Citing cases from "other contexts," Liberty Media suggests that even a share as small as 20% might be sufficient to give an investor *de facto* control where the ownership of the other 80% of a company is widely-dispersed.[32]

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31 *See, e.g.*, *QVC Network Inc.*, Memorandum Opinion and Order, 8 FCC Rcd. 8485 ¶ 7 (1993) (recognizing that the agency must implement the Communications Act in a manner that protects shareholders' rights (citing *Storer Commc'ns, Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985))); *Applications of GWI PCS, Inc. For Authority to Construct and Operate Broadband PCS Systems Operating on Frequency Block C*, Memorandum Opinion and Order, 12 FCC Rcd. 6441 ¶ 9 (WTB 1997).

32 *See Opposition* at 14.

Liberty Media's efforts to distinguish the *Comsat* and *CBS* cases cited by Sirius XM[33] only reinforce the fact-intensive nature of the agency's *de facto* control inquiry and the inadequacy of the *Application*. As Sirius XM has explained, *Comsat* stands for the bedrock concepts that *de facto* control determinations are based on a "totality of the elements" and that "the size of a minority shareholder's ownership interest is not dispositive."[34] The *Opposition* seeks instead to focus attention on a statutory limitation on control present in that case but not here.[35] However, the FCC in *Comsat* also examined the percentage of Lockheed's interest (49%), Comsat's continued control of the Board, and the nature of the pending merger agreement before concluding that Lockheed did not have *de facto* control.[36] This detailed probe into whether Lockheed "dominate[d] the management of corporate affairs" belies Liberty Media's claim that a single factor, such as share ownership, is dispositive.[37]

Sirius XM's *Petition* also cited *CBS* for the basic concept that examining control of the Board of Directors was a "most critical[]" factor in the FCC's conclusion that Laurence Tisch did not control CBS.[38] Liberty Media tries to distinguish *CBS* by focusing on the fact that the Commission was reviewing events that had already occurred, rather than events that might occur in the future.[39] Nothing in *CBS* suggests that examining control of the Board of Directors is "the most critical[]" factor in the *de facto* control analysis only if that analysis is backward rather than

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33 *See id.* at 17-24.

34 *Petition* at 15.

35 *See Opposition* at 21-22.

36 *Comsat* ¶¶ 34-41.

37 *Id.* ¶ 32.

38 *Petition* at 14 n.39.

39 *See Opposition* at 19.

forward looking. And Liberty Media's claim that *CBS* is distinguishable because "the Board of Sirius has not and cannot" represent that Liberty Media does not "intend to assume control" inverts its burden. Liberty Media has steadfastly refused to make any commitment to take a particular action with respect to Sirius XM. Liberty Media relies on this self-created uncertainty about its future intentions to distinguish *CBS* and this alone highlights the purely speculative nature of the *Application*. This is precisely the "hypothetical future exercise of control" that the Commission rejected as a basis for finding a transfer in *CBS* and in *American Mobile Radio Corp.*[40]

B. The Cases Cited By Liberty Media Cannot Support Its Reinvention Of The De Facto Control Analysis.

In the *Opposition*, Liberty Media continues to rely heavily on *DIRECTV/NewsCorp.* and *Liberty Media/DIRECTV*.[41] Yet, Liberty Media cannot reconcile two central and glaring differences between those cases and the present situation. *First*, in both *DIRECTV/NewsCorp.* and *Liberty Media/DIRECTV*, the applicants *agreed* that a *de facto* transfer of control was taking place and represented as much in their application.[42] This concurrence between the parties

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40 *American Mobile Radio Corp.* ¶ 11. *See supra* note 13.

41 *See Opposition* at 11-13 (citing *News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd. 3265 (2008) ("*Liberty Media/DIRECTV*").

42 Contrary to Liberty Media's suggestion that the FCC conducted an independent evaluation of control, *see Opposition* at 12-13, the agency's analysis of News Corp.'s "influence" as a minority shareholder was made pursuant to the Commission's public interest determination of anticompetitive harm, not *de facto* control. *See General Motors Corp. and The News Corp. Limited*, Memorandum Opinion and Order, 19 FCC Rcd. 473 ¶¶ 93-100 (2010) ("DIRECTV/*News Corp.*"). While influence does not amount to control under the FCC's *de facto* control standard, it is relevant to the FCC's "broader public interest" analysis. *Compare MCI/BT* ¶ 11 *with Liberty Media/DIRECTV* ¶¶ 55-63. In determining whether the transfer of control serves the public interest, the agency will consider to what extent the transfer of control may (1) reduce existing competition, (2) decrease the market power of dominant firms, and (3) affect future competition. *See Liberty Media/DIRECTV*, ¶¶ 55-63; *DIRECTV/NewsCorp.* ¶¶ 15-17.

obviated any need for the Commission to engage in a detailed analysis of whether the *de facto* control standard had been met. In contrast, the *Application* reflects no such consensus (indeed, quite to the contrary), rendering those cases inapposite. *Second*, in the cited cases, the minority stockholder seeking approval for a transfer of *de facto* control proposed to take leadership roles on the Board and in corporate management.[43] No similar shift of corporate responsibilities has occurred at Sirius XM. Both the composition of Sirius XM's Board and its management remain unchanged, and Liberty Media has proposed no transaction that would lead to a different result.

Stripped to its core, the *Application* and the *Opposition* posit that a single sentence in the introduction of *DIRECTV/NewsCorp.* establishes that stock ownership, in and of itself, conveys *de facto* control.[44] Liberty Media places far more weight on this sentence than it can possibly bear. It is simply not credible that the FCC would have discarded its review of the totality of relevant factors in a single introductory sentence of a decision that did not address substantively the *de facto* control standard, and where other indicia of control rendered such a revision unnecessary. As the Supreme Court has explained, law is not made by "hid[ing] elephants in mouseholes."[45]

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[43] *See DIRECTV/NewsCorp.* ¶ 2 ("As described in the Application, if the proposed transaction is consummated, Rupert Murdoch, chairman and chief executive officer ("CEO") of News Corp., will become chairman of Hughes, and Chase Carey, News Corp.'s former co-chief operating officer, will become president and chief executive officer of Hughes. Eddy Hartenstein, currently Hughes' corporate senior executive vice president, will be named vice chairman of Hughes. Hughes' board of directors will consist of 11 directors, six of whom will be independent directors.").

[44] *See Opposition* at 12 (citing *DIRECTV/NewsCorp* ¶ 2 ("If approved, the proposed transaction will result in News Corp. holding 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.")).

[45] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The D.C. Circuit has held that the FCC cannot hide policy changes in footnotes. *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1362 (D.C. Cir. 1993) (reversing a Commission decision regarding the timely filing

The two additional cases that Liberty Media attributes to "other contexts" also fail to support its novel proposition that ownership of an unrestricted minority interest alone amounts to *de facto* control. Liberty Media cites *Bartell Media Corp.*[46] and *Broadband Personal Communications Services*[47] for the notion that "similar equity interests [to Liberty Media's 40%] are sufficient to constitute *de facto* control."[48] In *Bartell Media*, the Commission approved a transfer of control to Downe Communications Corp. ("DCI") after considering the Bartell family's abandonment of "active management of corporate affairs" and DCI's existing and planned role in managing and programming the licensee stations, in addition to DCI's proposed acquisition of a 38% equity interest.[49] In *Broadband PCS*, *de facto* control was not even at issue. There, the FCC was considering the attribution standard under the commercial mobile radio service ("CMRS") spectrum aggregation limit.[50] The Commission's focus in that context was on "influence" rather than "control," evidenced by its statement that "even an entity that does not

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of applications which was based on one footnote in the order); *see also Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 630 (D.C. Cir. 2000) (finding that a license applicant did not have fair warning that a non-profit station with minorities constituting the majority of its board was not minority controlled when notice was only provided in a footnote reference to a policy statement). As the Supreme Court has explained, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see also Dillmon v. NTSB*, 588 F.3d 1085, 1089-1090 (D.C. Cir. 2009) ("Reasoned decision making, therefore, necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent.").

46 *Bartell Media Corp.*, Memorandum Opinion and Order and Notice of Apparent Liability, 19 FCC 2d 890 (1969).

47 *Broadband Personal Communications Services (Competitive Bidding and Ownership Rules)*, 11 FCC Rcd. 7824 (1996), *recon.* 12 FCC Rcd. 14031 (1997), *aff'd sub nom.*, *Bell South Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999) ("*Broadband PCS*").

48 *Opposition* at 13-14.

49 *Bartell Media Corp.* ¶¶ 16, 20.

50 *Broadband PCS* ¶¶ 119-20.

have *de facto* or *de jure* control but owns a 20% or more interest in a licensee would have sufficient influence to reduce competition and should be subject to the CMRS spectrum aggregation limit."[51] Neither of these cases supports Liberty Media's contention that owning an unrestricted 40% share, by itself, constitutes *de facto* control.

IV. THE AGENCY'S PROCEDURAL RULES REQUIRE DISMISSAL OF LIBERTY MEDIA'S APPLICATION.

Liberty Media's complaint that Sirius XM filed the *Petition* prior to a public notice ignores the agency's rules and precedent.[52] The FCC's rules permit consideration of a pleading filed prior to a Public Notice as an informal objection.[53] Additionally, Liberty Media contends that the *Petition* is procedurally defective because it did not include an affidavit.[54] However, the facts required for the Commission to dismiss Liberty Media's *Application* are not in dispute: (1) Liberty Media owns a 40% interest in Sirius XM;[55] (2) the expiration of certain provisions in the Investment Agreement did not alter the management, Board of Directors, or day-to-day operations of Sirius XM;[56] and (3) Liberty Media does not control the management, Board of Directors, or day-to-day operations of Sirius XM and has proposed no specific mechanism to do

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51 *Id.* ¶ 120. By treating the percentage of shares owned as the preeminent factor in the *de facto* control analysis, Liberty Media would erase the critical distinction, frequently recognized by the Commission, between influence and control.

52 *See Opposition* at 26-27.

53 *See* 47 C.F.R. § 25.154 ("[t]he Commission will classify as informal objections . . . any pleading not filed in accordance with [the procedural rules] of this section . . ."); *see also* 47 C.F.R. § 5.95.

54 *See Opposition* at 26 (contending that Sirius XM's Petition "does not comply with the applicable procedural requirements of Section 309 of the Communications Act and the Commission's Rules").

55 *See Application* at 2, 11, 14; *Opposition* at i, 1, 5-6, 14, 17, 24.

56 *See Application* at 2, 4-6, 12 (describing Liberty Media's "*potential* acquisition of *de facto* control"); *Opposition* at 4-7, 9-11.

so.[57] Any affidavit attached by Sirius XM to the *Petition* would have only reiterated these uncontested factual points.[58]

In contrast, the *Application* should be dismissed due to procedural infirmities. In *Peace Broadcasting Corp.*, previously cited by Sirius XM, the Commission made clear that a disputed transfer application is defective and must be dismissed unless signed by all necessary parties.[59] Because Liberty Media has not followed the proper filing procedures and has not obtained Sirius XM's signature, the agency must dismiss the *Application.* Liberty Media's claim that there is no corporate governance dispute in this case is preposterous given the simple fact that Sirius XM—at the direction of its Board—has opposed the *Application.* As in *Peace Broadcasting*, dismissal is appropriate here so that this dispute over corporate control can be resolved appropriately under state corporate law.[60]

The Commission's electronic filing and signature requirements are designed to ensure that transactions related to an FCC license are conducted with the permission and knowledge of the licensee.[61] The agency's filing requirements can be waived based only on the applicant's demonstration of good cause. In this case, however, Liberty Media has not articulated a valid

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57 *Application* at 9; *Opposition* at i, 5, 10-11, 24-25.

58 Moreover, the agency's rules for informal objections do not require specific allegations of fact supported by affidavits. 47 C.F.R. § 1.41 ("Requests should set forth clearly and concisely the facts relied upon, the relief sought, the statutory and/or regulatory provisions (if any) pursuant to which the request is filed and under which relief is sought, and the interest of the person submitting the request.").

59 *Peace Broadcasting Corp.*, Opinion, 36 FCC 2d 675, 676 (1972).

60 To the extent that such resolution requires the initiation of a proxy contest or a tender offer by Liberty Media, it is incumbent upon Liberty Media to appoint a trustee, as discussed in *supra* Section II, who can assist Liberty Media with its long form application upon the consummation of events that result in an actual transfer of control.

61 *See Petition* at 6; *see, e.g.,* 47 C.F.R. §§ 1.917, 5.57 (requiring signatures for the wireless and experimental applications, respectively).

basis for granting such an extraordinary waiver. Instead, it merely reiterates that the failure to comply with the Commission's rules "resulted directly from [Sirius XM]'s refusal to cooperate in the presentation and filing of the electronic applications."[62] But, as Sirius XM has explained, this reason "does not even begin to explain why the Commission should take the extraordinary step of accepting the Application for filing *despite* the fact that the alleged transferor did not authorize its filing."[63]

Finally, in refusing to cooperate with the *Application*, Sirius XM is not, as Liberty Media suggests, attempting to "thwart Commission consideration of the statutorily-required transfer applications."[64] Rather, as a matter of corporate governance, Sirius XM cannot join an application that it believes is inaccurate, unnecessary, and contrary to Commission precedent.[65] Participation by Sirius XM in the *Application* would suggest that the Company agrees that *de facto* control has been transferred. Because this would not be factually correct, Sirius XM

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62 *Opposition* at 25. Liberty Media does not address Sirius XM's other procedural arguments that Liberty Media failed to: (1) seek a waiver of Section 25.119(d)'s requirement to electronically file an FCC Form 312 and (2) justify the "extraordinary circumstances" required for the Commission to grant a temporary authorization for the earth and space stations. *See Petition* at 7 n.16.

63 *Petition* at 7. Liberty Media's implicit suggestion that its procedurally defective filings were made "in consultation with the FCC" does not mandate a different result. It is well settled that "[a] person relying on informal advice given by Commission staff does so at their own risk." *In re Applications of Mary Ann Salvatoriello*, Memorandum Opinion and Order, 6 FCC Rcd. 4705 ¶ 22 (1991). Liberty Media's "consultation," even if it occurred as Liberty says it did, does not forgive its numerous procedural deficiencies nor prevent the Commission from dismissing the *Application*.

64 *Opposition* at 25.

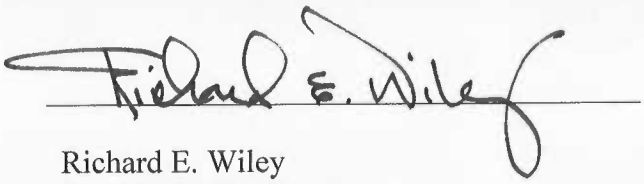
65 In fact, the FCC Form 312 that is required for the electronic filing of earth and space station transfer applications states the following: "WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND / OR IMPRISONMENT (U.S. Code, Title 18, Section 1001), AND/OR REVOCATION OF ANY STATION AUTHORIZATION (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503)." *See* FCC Form 312.

management determined, after consulting with its Board, that the Company could not support the *Application.*

V. CONCLUSION

For the foregoing reasons, the Commission should dismiss the *Application* as procedurally deficient and/or deny the *Application* as contrary to the Communications Act, the Commission's rules, and years of FCC precedent.

Respectfully Submitted,



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April 20, 2012

CERTIFICATE OF SERVICE

I, Jackie Martin, do hereby certify that on this 20th day of April 2012, I caused a copy of the foregoing "Reply of Sirius XM Radio Inc." to be delivered to the following via First Class U.S. mail or email:

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