

Before the
Federal Communications Commission
Washington, DC 20554

Application of)
Liberty Media Corporation) IBFS File Nos. SES-STA-20120320-
For Consent to Transfer of *De Facto*) 00280, SES-STA-20120320-00281,
Control of Sirius XM Radio Inc.) 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.
) unavailable
)

PETITION TO DISMISS OR DENY

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PETITION TO DISMISS OR DENY

Sirius XM Radio Inc. (“Sirius XM” or “the Company”) hereby submits the following Petition to Dismiss or Deny the Application for Consent to Transfer of *De Facto* Control filed by Liberty Media Corporation (“Liberty Media”),¹ and requests that the Commission promptly either dismiss the Application as procedurally defective or otherwise deny the Application. The Application contains a number of procedural deficiencies that are enough, standing alone, to warrant its prompt dismissal. The fact that Liberty Media was unable to secure signatures and information from the purported transferor of the FCC licenses provides clear evidence that both a majority of Sirius XM’s board of directors (the “Sirius XM Board”) and its management dispute Liberty Media’s assertion that the expiration of certain provisions of the Investment Agreement

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 (filed Mar. 20, 2012) (the “Application”). Liberty Media also submitted experimental applications, but file numbers were not yet available as of the time of this filing.

(the “Investment Agreement”), dated as of February 17, 2009, between Liberty Radio, LLC, an affiliate of Liberty Media (“Liberty Radio”), and Sirius XM results in a *de facto* transfer of control of the Company. In such circumstances, the FCC established more than forty years ago that the appropriate response is to dismiss a non-compliant application. The agency simply is not the correct forum to determine state law corporate governance issues, and the Commission does not and should not insert itself into disputes of this nature.

However, if the Commission decides to consider the merits, it should deny the Application because, as a factual matter, the expiration of certain provisions of the Investment Agreement does not result in a *de facto* transfer of control. *First*, Liberty Media’s interest in Sirius XM falls well short of the standard established by Commission precedent to establish *de facto* control. While Liberty Media holds a substantial minority interest, the Company continues to be controlled by the thirteen-member Sirius XM Board on which Liberty Media has only minority, proportional representation. As the holder of the Series B-1 Preferred Stock, Liberty Media currently designates five of the thirteen members of the Sirius XM Board, two of which must be independent of Liberty Media. Moreover, both the Chairman of the Sirius XM Board and Sirius XM’s CEO are independent of Liberty Media and have a relationship with Sirius XM that predates Liberty Media’s investment and acquisition of a minority interest in the Company. *Second*, contrary to Liberty Media’s claim, the expiration of certain provisions in the Investment Agreement does not affect control of Sirius XM. Liberty Media has not acquired any additional equity, voting rights, seats on the Sirius XM Board, or power over programming, personnel or finances. Instead, expiration of the provisions does nothing more than remove a prior bar to Liberty Media taking *additional* actions to acquire control of Sirius XM, should it eventually decide to do so—such as purchasing additional shares.

Commission precedent holds that *de facto* control must be judged on the facts as they exist now, not on speculation about what may occur in the future. No *de facto* transfer has occurred for FCC purposes, nor has Liberty Media presented any proposal to acquire *de facto* control of Sirius XM. The Commission must dismiss or deny the Application.

I. BACKGROUND

On February 17, 2009, Sirius XM and Liberty Radio entered into a series of agreements, pursuant to which Liberty Media agreed to lend up to \$530 million to Sirius XM and its subsidiaries² and Liberty Media acquired preferred stock convertible into an approximately 40% minority equity stake in Sirius XM.³ Liberty Media also received rights typically provided to

² On February 17, 2009, Sirius XM entered into a Credit Agreement (the “LM Credit Agreement”) with Liberty Media Corporation, as administrative agent and collateral agent, and Liberty Media, LLC, as lender. The LM Credit Agreement provided for a \$250 million term loan and \$30 million of purchase money loans. In August 2009, Sirius XM repaid all amounts due and terminated the LM Credit Agreement.

On February 17, 2009, XM Satellite Radio Inc. (“XM”) entered into a Credit Agreement with Liberty Media Corporation, as administrative agent and collateral agent, and Liberty Media, LLC, as lender. On March 6, 2009, XM amended and restated that credit agreement (the “Second-Lien Credit Agreement”) with Liberty Media. The Second-Lien Credit Agreement provided for a \$150 million term loan. In June 2009, XM repaid all amounts due and terminated the Second-Lien Credit Agreement.

On March 6, 2009, XM amended and restated the \$100 million Term Loan, dated as of June 26, 2008, with the lender parties thereto and UBS AG as administrative agent, and the \$250 million Credit Agreement, dated as of May 5, 2006, with the lender parties thereto and JPMorgan Chase Bank, N.A. as administrative agent. These facilities were combined as term loans into the Amended and Restated Credit Agreement (the “Amended and Restated Credit Agreement”), dated as of March 6, 2009, with the lender parties thereto and JPMorgan Chase Bank, N.A. as administrative agent. Liberty Media, LLC, purchased \$100 million aggregate principal amount of such loans from the existing lenders. In June 2009, XM used a portion of the net proceeds from the sale of other notes to extinguish the Amended and Restated Credit Agreement.

³ Pursuant to the Investment Agreement, in March 2009 Sirius XM issued to Liberty Radio 12,500,000 shares of Series B Preferred Stock with a liquidation preference of \$0.001 per share. The Series B Preferred Stock is convertible into 2,586,976,000 shares of Sirius XM common stock, representing approximately 40% of Sirius XM’s outstanding shares (after giving effect to such conversion). See Investment Agreement, available at

significant but non-controlling minority stockholders.⁴ In particular, since 2009, Liberty Media, as the holder of the Series B-1 Preferred Stock, has had the right to designate a certain minority number of Preferred Stock Directors on the Sirius XM Board dependent on the number of outstanding shares of Series B-1 Preferred Stock and the size of the board.⁵ As noted in a footnote in the Application, Liberty Media, as the holder of the Series B-1 Preferred Stock, currently designates five (two of which must be independent of Liberty Media) of the thirteen members of the Sirius XM Board.⁶

The Investment Agreement also restricted potential actions that Liberty Media could take with respect to Sirius XM (hereafter, “Investment Agreement Provisions”), a number of which expired on March 6, 2012. Pursuant to these Investment Agreement Provisions, Liberty Media was required to vote “in favor of the election of each candidate designated, recommended or nominated for election by the Nominating and Corporate Governance Committee of the Board of

<http://www.sec.gov/Archives/edgar/data/908937/000119312509049874/dex455.htm> (Exhibit 4.55).

Although it does not impact the non-controlling nature of Liberty Media’s minority equity stake, Liberty Media’s statement that “no other shareholder of [Sirius XM] owns 5 percent of its outstanding common stock” is not accurate. *See* Application at 2. In fact, Wellington Management Company, LLP has disclosed a 5.52% interest in Sirius XM. *See* Wellington Management Company, LLP, Disclosure Document (Schedule 13G) (Dec. 31, 2011), *available at* http://www.sec.gov/Archives/edgar/data/902219/000090221912000401/sec_filing.htm.

⁴ *See* Certificate of Designations of Convertible Perpetual Preferred Stock, Series B-1 of Sirius XM Radio, at 21-23, § 12 (“Certificate of Designations”); Investment Agreement at 11, § 3.3; *id.* at 12, § 4.1(c)(2).

⁵ *See* Certificate of Designations at 18-21, § 11.

⁶ Application at 3, n.3.

Directors” of Sirius XM.⁷ In addition, the Investment Agreement Provisions prohibited Liberty Media from:

- entering into or seeking to enter into a merger, acquisition, asset sale, or other business combination relating to Sirius XM or its subsidiaries;⁸
- “seek[ing], propos[ing] or otherwise act[ing] alone or in concert with others, to influence or control the management, board of directors or policies” of Sirius XM; and⁹
- joining a “group” with respect to any of the voting securities of Sirius XM, calling a meeting of Sirius XM stockholders or initiating a stockholder proposal, or soliciting proxies to vote or seek to influence voting with respect to Sirius XM securities.¹⁰

Finally, the Investment Agreement barred Liberty Media from acquiring, or proposing to acquire, 49.9% or more of Sirius XM common stock without the prior written approval of the Independent Common Directors¹¹ or, from March 6, 2011 to March 6, 2012, pursuant to a tender offer for all outstanding shares of Sirius XM common stock at market value or greater.¹²

On March 6, 2012, Liberty Media sent the Commission a letter suggesting that the expiration of the Investment Agreement Provisions necessitated FCC consent for the transfer of *de facto* control of Sirius XM to Liberty Media. On March 20, 2012, Liberty Media submitted

⁷ Investment Agreement, § 4.9(a).

⁸ *Id.*, § 4.1(c)(1).

⁹ *Id.*, § 4.1(c)(3).

¹⁰ *Id.*, §§ 4.1(c)(2), (3); 4.9(b).

¹¹ The Investment Agreement defines an “Independent Common Director” as: “any director who (i) is or would be an ‘independent director’ with respect to the Company and with respect to Purchaser pursuant to NASDAQ Rule 4200(a)(15) and (ii) is not a Preferred Stock Director.” *Id.* § 4.1(e)(2).

¹² *Id.*, § 4.1(a) & (b).

its Application for *de facto* transfer of control of the licenses and authorizations held by Sirius XM.

On March 22, 2012, Sirius XM filed a letter in response to the Application stating that the Company did not believe that the expiration of the Investment Agreement Provisions changed control of Sirius XM and that Sirius XM intended to file a formal response seeking dismissal or denial of the applications.

II. THE COMMISSION SHOULD DISMISS LIBERTY MEDIA'S APPLICATION AS PROCEDURALLY DEFICIENT

Liberty Media's Application seeking consent to the *de facto* transfer of all satellite, earth station, wireless, and experimental authorizations held by Sirius XM to Liberty Media does not comply with the Commission's procedural rules for the filing of transfer of control applications, and no justification exists for waiving these rules. Liberty Media's inability to meet the agency's filing standards is a clear indication that it is not in *de facto* control of Sirius XM. Under these circumstances, prompt dismissal of Liberty Media's transfer application is required.

The Application contains a number of fundamental procedural defects. Liberty Media failed to submit each component of the Application electronically.¹³ Liberty Media used the wrong form when attempting to file electronically.¹⁴ Most importantly, Liberty Media failed to include signatures for the licensees and the purported transferor, Sirius XM.¹⁵ Each of these

¹³ 47 C.F.R. § 1.913 (requiring electronic filing on FCC Form 603 for wireless authorizations); 47 C.F.R. §§ 5.55, 5.59(e) (requiring electronic filing on FCC Form 703 for experimental authorization).

¹⁴ Pursuant to Section 25.119(d), transfer of control applications must be submitted electronically on FCC Form 312. 47 C.F.R. § 25.119(d). Liberty Media filed applications for Special Temporary Authority ("STA"), signed solely by Liberty Media, and attached to this electronic application form a copy of the FCC Form 312 and exhibits.

¹⁵ 47 C.F.R. §§ 1.917, 5.57 (requiring signatures for the wireless and experimental applications, respectively).

procedural defects, standing alone, provides an independent reason for the agency to dismiss the Application.

Moreover, Liberty Media's request for a waiver is unsupported by "good cause."¹⁶ Liberty Media merely notes that Sirius XM has refused to provide the passwords and other information necessary to generate and file electronic applications.¹⁷ While this is the literal reason that Liberty could not file the Application, it 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. This is the equivalent of trying to cash an unsigned check and explaining the lack of a signature by saying nothing more than "the account holder refused to sign it." The electronic filing and signature requirements exist for a reason. They are designed to ensure that transactions related to an FCC license are conducted with the permission and knowledge of the licensee. In light of the Commission's requirements that an application (i) be filed electronically and (ii) bear the signature of the licensee/transferor, the failure to comport with these rules is a fatal flaw and provides no reason for the Commission to grant a waiver.

¹⁶ See Liberty Media, Request for Waiver of Electronic Filing and Transferor/Licensee Signature Requirements for Applications for Consent to Transfer of *De Facto* Control, at 2 (filed Mar. 20, 2012) ("Waiver Request"). Besides failing to justify "good cause" for a waiver, the Waiver Request contains two other defects. First, Liberty Media failed to seek a waiver of Section 25.119(d)'s requirement to electronically file an FCC Form 312. See note 14, *supra*. Second, Liberty Media's STA filing is inconsistent with the Commission's rules. Applications for STA for earth and space stations are governed by Section 25.120 of the Commission's rules, which states that "[t]he Commission may grant a temporary authorization only upon a finding that there are extraordinary circumstances requiring temporary operations in the public interest . . ." 47 C.F.R. § 25.120(b)(1). As with its other requests for a waiver, Liberty Media failed to provide any explanation as to why "extraordinary circumstances" would justify special temporary authority to improperly file these transfer applications.

¹⁷ See, e.g., Waiver Request at 1, 2, and 4.

Liberty Media's inability to fulfill the Commission's procedural requirements is a clear indication that it is not in *de facto* control of the Company. Sirius XM has not provided Liberty Media with its passwords and signatures. As a matter of corporate governance, Sirius XM cannot participate in an application that it believes to be inaccurate, unnecessary, and contrary to Commission precedent.¹⁸ Any participation by Sirius XM in the Application could suggest that Sirius XM agrees with Liberty Media's assertion that *de facto* control has transferred. Because this would not be factually correct, Sirius XM management determined, after consulting with the Sirius XM Board, that the Company could not support the Application.

The Commission is not the proper forum to resolve matters between Sirius XM and its largest stockholder. The FCC has firmly stated that “[i]t is not in the public interest for our administrative process to be utilized, either by design or by unintended result, in a manner which favors either the incumbent or the challenger in disputes over corporate control.”¹⁹ The agency favors “marketplace considerations” and not “the artificial dictates of governmental procedures.”²⁰ In circumstances similar to the instant case, the Commission established that the

¹⁸ 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.

¹⁹ *Tender Offers and Proxy Contests*, Policy Statement, 59 Rad. Reg. 2d 1536, ¶ 6 (1986), *appeal dismissed sub. nom. Office of Communication of the United Church of Christ v. F.C.C.*, 826 F.2d 101 (D.C. Cir. 1987) (“*Tender Offer Policy Statement*”). The *Tender Offer Policy Statement* sets out clear rules that govern hostile takeover attempts, but Liberty Media has not initiated the type of corporate action—such as a tender offer or a proxy contest—that would fall under the rubric of the *Statement*, and the Application does not seek to invoke it.

²⁰ *Id.* “We do not seek to further private interests; rather, we strive to serve the public interest by accommodating, to the fullest extent possible, other federal and state laws and policies, including the national policy reflected in the securities laws.” *Id.*, ¶ 3 n.7.

proper response is to dismiss a disputed application that failed to comply with the Commission's rules. Specifically, in *Peace Broadcasting Corp.*, the FCC found that a transfer application was defective unless signed by all parties to the application.²¹ The signature was not included in the application due to a corporate dispute between minority shareholders and a majority shareholder. The Commission refused to grant a waiver of the signature rule while the corporate dispute was pending. Instead, the FCC recognized the dispute was a matter of state corporate law and suggested that the application could be re-filed once the dispute was resolved.

Liberty Media does not have access to Sirius XM's passwords and cannot direct management to provide these passwords or required signatures. This alone demonstrates beyond any question that Liberty Media does not control the Company. The inability of the alleged transferee to secure the permission of the supposed transferor is grounds for dismissal of the Application.

III. LIBERTY MEDIA DOES NOT HAVE *DE FACTO* CONTROL OF SIRIUS XM

The expiration of the Investment Agreement Provisions does not grant Liberty Media *de facto* control of Sirius XM. Liberty Media is a significant minority stockholder; however, it lacks the ability to direct the Company's management or operations. 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 the expiration of the Investment Agreement Provisions. The expiration of the Investment Agreement Provisions does no more than remove certain barriers to Liberty Media's ability to take additional steps to acquire control of Sirius XM, should it decide to take those steps. Nothing in the Application evidences any plans by Liberty Media to take the actions necessary to acquire control of Sirius XM. The Sirius XM Board remains in control of

²¹ *Peace Broadcasting Corp.*, 36 FCC 2d 675, 676 (1972).

the Company, and Sirius XM's existing leadership continues to manage the Company's daily operations, oversee its corporate affairs, and make and effectuate policy decisions regarding the Company's future direction.

A. Standard of Review for *De Facto* Control

Section 310(d) of the Communications Act prohibits the transfer of control of a station license without the Commission's prior approval or consent.²² The FCC's analysis of *de facto* control is highly fact specific, and each case must be examined individually.²³ As the agency repeatedly has stated, the ascertainment of *de facto* control "must of necessity transcend formulas, for it involves an issue of fact which must be resolved by the special circumstances presented."²⁴ In determining whether a minority stockholder may have acquired *de facto* control,

²² 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").

²³ In analyzing *de facto* control of a station, the Commission examines policies governing the station's programming, personnel, and finances. See *WHDH, Inc.*, 17 F.C.C. 2d 856, 863 (1969), *aff'd sub nom., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970). In analyzing *de facto* control, the agency has long utilized the factors set forth in the FCC's *Intermountain Microwave* decision, which focus on a party's ability to oversee daily operations. 12 F.C.C. 2d at 559-560. These factors are: (1) Who controls daily operations?; (2) Who is in charge of employment, supervision, and dismissal of personnel?; (3) Does the licensee have unfettered use of all facilities and equipment?; (4) Who is in charge of the payment of financing obligations, including expenses arising out of operating?; (5) Who receives monies and profits from the operation of the facilities?; and (6) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? *Id.*

²⁴ *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975); *Lockheed Martin Corp. Regulus LLC and Comsat Corp.*, Memorandum Order and Authorization, 14 FCC Rcd 15816, ¶ 30 (1999) ("*Comsat/Lockheed*"); *Univision Holdings, Inc. (Transferor) and Perechio Television, Inc. (Transferee)*, Memorandum Opinion and Order, 7 FCC Rcd 6672, ¶ 15 (1992) ("*Univision Holdings, Inc.*"); see also *Mr. William S. Paley, CBS Inc.*, 1 FCC Rcd 1025, 1025 (1986) ("[T]here is no precise formula by which control may be ascertained." (quoting *Tender Offer Policy Statement*, at ¶ 10)) ("*CBS, Inc.*"); *News International, PLC*, Memorandum Opinion and Order, 97 F.C.C.2d 349, ¶ 16 (1984) ("*News Int'l*").

the agency is “governed chiefly by the demonstration of [the shareholder’s] power to *dominate* the management of the corporate affairs.”²⁵

When conducting this analysis, the agency is very careful to distinguish between influence and control.²⁶ To rise to the level of a transfer of control, 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”²⁷ As the Commission expressly has acknowledged, “non-controlling shareholders influence the operation of a company and, indeed . . . it is reasonable to expect that an entity with an investment in a company will have an incentive to act to protect its investment.”²⁸ Accordingly, “the Commission’s precedent allows shareholders to wield significant influence, including the ability to affect the outcome of votes or the day-to-day operations of a company” without finding those shareholders to be in control of the company,

²⁵ *Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951) (emphasis added); *News Int’l*, ¶ 21; *Sprint Corp.*, Petition for Declaratory Ruling, 11 FCC Rcd 1850, ¶ 20 (1996) (“*Sprint Corp.*”) (“According to Commission precedent, whether an entity holding a minority stock interest controls a corporation primarily depends on whether the minority shareholder has the power to ‘dominate’ the management of corporate affairs.”); *Request of MCI Communications Corp. British Telecommunications plc*, Joint Petition for Declaratory Ruling, 9 FCC Rcd 3960, ¶ 11 (1994) (“*MCI/BT*”); see also *CBS, Inc.*, at 1026 (“[T]he Commission will find a *de facto* transfer of control to a minority shareholder only where there is clear evidence of that minority shareholder/director’s dominance.”).

²⁶ See, e.g., *News Int’l*, at ¶ 16 (noting that “influence and control are not the same thing”); *MCI/BT*, at ¶ 11 (“[The FCC’s] standard acknowledges that influence and control are not identical.”); see also *Comsat/Lockheed*, ¶ 32.

²⁷ *News Int’l*, at ¶ 16; *MCI/BT*, at ¶ 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.*, at ¶ 20.

²⁸ *Comsat/Lockheed*, at ¶ 31; see also *MCI/BT*, at ¶ 14 (holding that minority stockholder consent rights do not constitute a transfer of control); *Sprint Corp.*, at ¶ 25 (same).

“so long as that influence does not rise to a consistent level of dominance at which the minority shareholder is determining how the company runs and what business choices it makes.”²⁹ In reviewing cases in which minority shareholders played a far greater role in a licensee’s day-to-day operations than Liberty Media does in Sirius XM, the agency concluded that those circumstances were insufficient to demonstrate a transfer of control. Even where a minority shareholder is appointed the Chief Executive Officer of the company and “clearly plays an important role in the operations of” the licensee, absent additional evidence that the shareholder “alone or in privity with other Directors under his domination, has obtained ultimate control over” the licensee, there was not a *de facto* transfer of control.³⁰

The FCC also has explicitly stated 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.”³¹ In the absence of clear evidence that an unauthorized party is in actual control of an FCC licensee or its parent entity, the agency will not second-guess a licensee’s governing documents or the representations that a company makes to the Commission regarding its ownership and operations.³² As the agency explained, “it is not appropriate to infer, in the absence of information to the contrary, that [a party] will not faithfully carry out its representations or that it

²⁹ *Comsat/Lockheed*, at ¶ 31; *see also Sprint Corp.*, at ¶ 25; *MCI/BT*, at ¶ 14.

³⁰ *CBS, Inc.*, at 1026 (finding further that the “[t]he mere fact that Mr. Tisch’s accession may affect working control of CBS does not mean that this event constitutes a transfer of control.”).

³¹ *American Mobile Radio Corporation; Application for Authority to Construct, Launch, and Operate Two Satellites in the Satellite Digital Audio Radio Service*, 16 FCC Rcd 21431, at ¶ 11 (2001) (“*American Mobile Radio*”).

³² *See in re Nolan*, 26 FCC Rcd 6155, 6158 (2011) (“[T]here is an inherent contradiction in crediting the representations of an applicant that essentially asks us to ignore certain of its other representations, both those made in publicly filed documents and those made in the Bylaws that it adopted to govern itself.”).

will be controlled and operated in a manner that differs from the agreement under consideration.”³³

B. The Sirius XM Board Controls the Company, and Liberty Media’s Current Minority Representation on the Board Does Not Give It the Ability to Control Sirius XM

Sirius XM is a publicly traded company controlled by its board of directors. Sirius XM’s Corporate Governance Guidelines (“Guidelines”) specify that it is the responsibility of the Sirius XM Board to “supervise and direct the management of the Company in the interest and for the benefit of the Company’s stockholders.”³⁴ The FCC has previously noted that Sirius XM is controlled by its board.³⁵ This board control of the Company is consistent with FCC precedent: “[i]n publicly traded corporations . . . , it is the Board, rather than the shareholders, that is in actual control of policies and corporate affairs.”³⁶

³³ *News Int’l*, at ¶ 17; see also *Cosat/Lockheed*, at ¶ 30 n.72; *Univision Holdings, Inc.*, at ¶ 25 (“In the absence of properly supported specific factual allegations, we do not assume that applications will operate other than as represented.”)

³⁴ Sirius Satellite Radio Inc. Corporate Governance Guidelines, available at <http://files.shareholder.com/downloads/SIRI/600658345x0x202027/c09d3b85-916e-425d-b6e2-adb5d8d4e9a2/guidelines.pdf>. The Guidelines specify that, among other things, the Board has the obligation to: oversee the conduct of the company’s business to evaluate whether the business is being properly managed; review and, where appropriate, approve the company’s major financial objectives, plans and actions; assess major risk factors relating to the company and its performance, and review measures to address and mitigate such risks; regularly evaluate the performance and approve the compensation of the Chief Executive Officer and, with the advice of the Chief Executive Officer, regularly evaluate the performance of the company’s executive officers; and plan for succession with respect to the position of Chief Executive Officer and monitor management’s succession planning for other key executives.

³⁵ *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, ¶ 20 (2008) (“*Sirius XM Merger Order*”).

³⁶ *Cosat/Lockheed*, at ¶¶ 35, 41.

Liberty Media does not possess control of the Sirius XM Board. Liberty Media has appointed and has the right to appoint only five (two of which must be independent of Liberty Media) of thirteen Sirius XM Board members.³⁷ The remaining eight members, including Eddy Hartenstein, the current Chairman, and Mel Karmazin, the current CEO, are independent of and not appointed by Liberty Media. Liberty Media's representation is only proportionate with its minority investment.³⁸ In evaluating the totality of circumstances surrounding *de facto* control of corporate entities, the Commission has determined that merely holding proportional representation is not sufficient to serve as an additional indicia of control.³⁹ Furthermore, Sirius XM's Board has discussed the Application, declined to direct the Company's management to assist Liberty Media in the Application, and instead authorized the filing of this Petition. These facts unequivocally demonstrate that Liberty Media does not have *de facto* control of the Sirius XM Board or the Company's FCC licenses.

³⁷ See Application at 3 n.3.

³⁸ The Commission repeatedly has found that a minority shareholder's right to proportionate representation on a Board of Directors is not an indication of *de facto* control. For example, in evaluating the interests of 20% minority shareholders in *MCI/BT* and *Sprint*, respectively, the Commission concluded that the ability of minority shareholders to appoint three members of a 15 person Board of Directors did not lead to a finding of *de facto* control. See *MCI/BT*, at ¶ 12; *Sprint Corp.*, at ¶ 23. On the other hand, in *Metromedia, Inc.*, the Commission found that the power of John Kluge to determine *all* of the nominees to Metromedia's Board of Directors was one important factor in its finding that Mr. Kluge exercised *de facto* control over the corporation. See *Metromedia, Inc.*, 98 F.C.C.2d 300, ¶ 9 (1984).

³⁹ For example, in response to a petition filed by a public interest organization, the Commission concluded in the 1980s that there had been no unauthorized transfer of control of CBS Inc. to 25% shareholder Loews Corporation, or to Larry Tisch as the Chairman of Loews, despite the fact that Tisch was the Chief Executive Officer of CBS and "clearly play[ed] an important role in the operations of CBS." *CBS Inc.*, at 1026. In reaching this conclusion, the FCC stated that CBS's "active and independent Board of Directors" was the "most critical[]" factor in its conclusion that Tisch did not control CBS. *Id.* at 1027.

Liberty Media similarly lacks any ability to dominate Sirius XM's corporate affairs. The FCC's *de facto* control analysis, as articulated in the *Intermountain Microwave* decision, focuses on a party's ability to oversee daily operations and seeks to determine who carries out policy decisions, "including the preparation and filing of applications."⁴⁰ Liberty Media does not oversee the day-to-day operations of Sirius XM. It does not make programming decisions, personnel decisions, negotiate contracts, or participate in any of the other functions necessary to keep the business operating. Moreover, by Liberty Media's own admission, Sirius XM affirmatively disagreed with Liberty Media's submission, declined to provide Liberty Media with its FCC passwords, and chose not to sign Liberty Media's Application.⁴¹ Not only does Liberty Media's unauthorized submission fail a crucial factor of the *Intermountain Microwave* test, it conclusively demonstrates that Liberty Media does not currently dominate Sirius XM's corporate affairs.

The Application's legal analysis relies primarily (or even exclusively) on Liberty Media's approximate 40% ownership stake in Sirius XM to claim *de facto* control of the Company.⁴² The Commission has made clear that, absent specific and conclusive evidence that the party in question is in a position to "dominate the management of corporate affairs," the size of a minority shareholder's ownership interest is not dispositive in its analysis of *de facto* control.⁴³

⁴⁰ See *Intermountain Microwave*, at 559-560.

⁴¹ Application at 1 n.1, 5 n.4, 13 n.7.

⁴² *Id.* at 11.

⁴³ *Comsat/Lockheed*, at ¶ 34 (finding that Lockheed Martin's 49% interest in Comcast Corporation did not amount to *de facto* control despite the fact that no other shareholder was likely to hold more than a "few percent" of Comsat's shares); *Univision Holdings, Inc.*, at ¶ 15; see also *MCI/BT*, at ¶ 11; *Sprint Corp.*, at ¶ 20.

The instant situation is markedly different from Liberty Media's acquisition of The DIRECTV Group, Inc. ("DIRECTV") in 2008 and from News Corporation's ("News Corp.'s") previous controlling stake in DIRECTV.⁴⁴ Although the voting stakes involved in the DIRECTV transactions were of comparable size to Liberty Media's minority investment in Sirius XM, the transactions are simply not analogous for purposes of FCC *de facto* control analysis. As a preliminary matter, the Commission did not evaluate the *de facto* control issue in either case. In each transaction, both the transferor and transferee were in agreement that the contemplated transaction would result in a *de facto* transfer of control.⁴⁵ Accordingly, the FCC did not need to conduct an independent analysis of the *de facto* transfer of control standard. In contrast, Sirius XM disagrees that Liberty Media has *de facto* control of the Company and, thus, the Commission must independently evaluate Liberty Media's influence. In addition, in each of those transactions, the acquiring parties took affirmative steps beyond simply securing a 40% minority stake in the transferee to ensure that they would have the ability to control operations. For example, following the *Liberty/DIRECTV* transaction, John Malone became the Chairman of DIRECTV's Board of Directors. Similarly, as a result of the *News Corp./DIRECTV* transaction,

⁴⁴ *News Corp. and The DIRECTV Group, Inc., Transferors and Liberty Media Corporation, Transferee*, 23 FCC Rcd 3265 (2008) ("*DIRECTV/Liberty Media*"); *General Motors Corp. and The News Corp. Limited*, 19 FCC Rcd 473 (2004) ("*DIRECTV/News Corp.*").

⁴⁵ In *DIRECTV/News Corp.*, the Commission observed that the applicants "implicitly concede, by having filed the Application presently before us, that News Corp. will be considered to have *de facto* control of Hughes under Commission precedent." *DIRECTV/News Corp.*, at ¶ 97. In *Liberty/DIRECTV*, the applicants, relying on the Commission's "prior conclusion in the [*News Corp./DIRECTV*] Order" proffered that the "Commission may deem Liberty Media to exercise *de facto* control over DIRECTV under its totality of the circumstances test for purposes of the Communications Act." Application of News Corp. and the DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, MB Dkt. No. 07-18 at 3 (filed Jan. 29, 2007). Thus, in the merger Order, the Commission merely recognized that the "applicants acknowledge that Liberty Media will have *de facto* control over DIRECTV." See *DIRECTV/Liberty Media*, at ¶ 18.

Rupert Murdoch became DIRECTV's Chairman, and Chase Carey, a former Co-Chief Operating Officer of News Corp., became the Company's CEO.⁴⁶ While these changes alone may not demonstrate *de facto* control, the Application here presents no such comparable changes to Sirius XM's Chairman or CEO.

C. The Expiration of the Investment Agreement Provisions Does Not Change Control of Sirius XM

The expiration of the Investment Agreement Provisions transfers nothing to Liberty Media that alters its current, non-controlling interest in Sirius XM. Liberty Media did not obtain new Board representation, or gain the ability to terminate existing managers, put in place different executives, or change business strategy and policy. In other words, the expiration of the Investment Agreement Provisions changed no facts relevant to the FCC's *de facto* control analysis.

Liberty Media effectively conceded as much to the U.S. Securities and Exchange Commission (the "SEC") two weeks prior to the expiration of the Investment Agreement Provisions. In its Annual Report on Form 10-K filed with the SEC on February 23, 2012 (the "Form 10-K"), Liberty Media identified its lack of control over Sirius XM as a risk factor in its business:

We do not have the right to manage our business affiliates, which means we are not able to cause those affiliates to operate in a manner that is favorable to us.

We do not have the right to manage the businesses or affairs of any of our business affiliates (generally those companies in which we have less than a majority voting stake), *including Sirius XM Radio*, Barnes & Noble and Live Nation. Rather, our rights may take the form of representation on the board of directors or a partners' or similar committee that supervises management or possession of veto rights over significant or extraordinary actions. The scope of

⁴⁶ *DIRECTV/News Corp.*, ¶ 2.

our veto rights vary from agreement to agreement. Although our board representation and veto rights may enable us to exercise influence over the management or policies of a business affiliate, enable us to prevent the sale of material assets by a business affiliate in which we own less than a majority voting interest or prevent us from paying dividends or making distributions to our stockholders or partners, they will not enable us to cause these actions to be taken.⁴⁷

Notably absent is any indication that this risk factor asserting Liberty Media's lack of control over Sirius XM would cease to apply upon expiration of the Investment Agreement Provisions. Even more telling, the Form 10-K does not disclose that the impending expiration of the Investment Agreement Provisions would necessitate filing an FCC application for approval of a *de facto* change in control of Sirius XM.

The Application itself takes a similar position. By referring to a "proposed transfer of control" and "potential acquisition of *de facto* control,"⁴⁸ the Application concedes that the expiration of the Investment Agreement Provisions is insufficient, standing alone, to have resulted in a transfer of control. This is further confirmed by the timing of the Application, which was filed *after* the date that the Investment Agreement Provisions expired.⁴⁹ The Application asserts that the only thing preventing a *de facto* transfer is Liberty Media's voluntary

⁴⁷ Liberty Media Corporation, Annual Report on Form 10-K for the year ended December 31, 2011, at I-13 (filed Feb. 23, 2012) (*italics added*). As the Commission has noted, "there is an inherent contradiction in crediting the representations of an applicant that essentially asks us to ignore certain of its other representations," which includes "those made in publicly filed documents." *In re Nolan*, 26 FCC Rcd at 6158.

⁴⁸ Application at 12.

⁴⁹ Liberty Media waited to file its letter with the Commission until March 6, 2012, the same day that Sections 4.1(c) and 4.9 of the Investment Agreement expired, and did not file the Application until March 20, 2012. Even assuming the Commission would have adhered to its informal 180-day "shot clock" review schedule without any delay, if Liberty Media believed that the expiration of certain provisions of the Investment Agreement on March 6, 2012 was going to have a material impact on the FCC's *de facto* control analysis, it should have submitted the Application no later than September 6, 2011.

commitment to abide by the Investment Agreement Provisions “until the Commission acts upon this application, the application is withdrawn, or circumstances change and Liberty Media advises the Commission of the changed circumstances.”⁵⁰ But unilateral commitments that can be changed or withdrawn at any time cannot possibly be sufficient to avoid a claim of *de facto* control—if they were, any party confronted with a charge of an unauthorized transfer could avoid sanctions merely by promising not to exercise that control going forward.

Liberty Media’s further suggestion that the Application is somehow necessitated by three-year-old informal FCC conversations is equally unpersuasive. The Application asserts that, in 2009, Commission staff “requested that Liberty Media confirm that it would not exercise *de facto* control of Sirius [XM].”⁵¹ The Application implies that, because of those representations, the Commission made a finding that there was no *de facto* transfer of control. The 2009 letter, however, was a submission made by Liberty Media in response to a modest staff inquiry triggered by press reports of the Liberty Media investment in Sirius XM. The FCC took no steps beyond an informal inquiry because there was no evidence that Liberty Media was in *de facto* control of the Company. The agency did not render an opinion about whether the representations in the letter were in any way relevant to a transfer of control analysis. The agency’s lack of a response to this informal letter in 2009 cannot in any way be read as an endorsement of, or a request for, the Application.

Liberty Media’s position—that removal of restrictions on its ability to take action that could result in a transfer of control is equivalent to the transfer having actually occurred—is deeply flawed as a matter of basic logic. The expiration of the Investment Agreement Provisions

⁵⁰ Application at 2.

⁵¹ *Id.* at 4.

permits Liberty Media to take certain further actions that could ultimately result in a transfer of control but, by itself, it does not grant Liberty Media any additional authority over the Company. Nor does the expiration suggest that Liberty Media has any plans to take the additional actions that would be necessary to assume control of Sirius XM. There is no basis in FCC precedent for characterizing the removal of these kinds of restrictions as a transfer of control, and the Application cites none. To the contrary, the Commission requires 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.”⁵² The Application’s argument is also directly contradicted by the agency’s traditional practice of refusing to attribute even options, warrants, and other conditional ownership interests, which are far more concrete than the expiration of the restrictions at issue here.⁵³

In sum, Liberty Media now *can* enter into or seek to enter into a merger, acquisition, asset sale, or other business combination, *but it has not done so*, nor has it proposed to do so. Liberty Media now *can* seek to control the management, board of directors or policies of Sirius XM, *but it has not done so*, nor has it proposed to do so. And Liberty Media now *can* join a “group” with respect to the voting securities of Sirius XM, call a meeting of the Sirius XM stockholders, initiate a stockholder proposal, or solicit proxies to vote with respect to Sirius XM securities, *but it has not done so*, nor has it proposed to do so. Without taking one or more of these steps, Liberty Media is not in a position to dictate the day-to-day operations of Sirius XM,

⁵² *American Mobile Radio*, at ¶ 11.

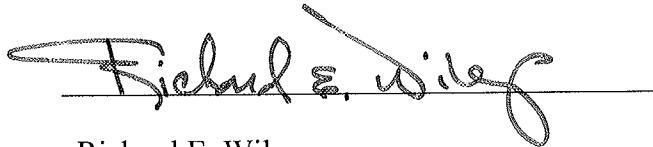
⁵³ See 47 C.F.R. §§ 20.6(d)(5) (CMRS spectrum cap), 73.3555, n.2(e) (broadcast ownership restrictions), 76.501, n.2(e) (cable cross-ownership restrictions); *In re Application of GWI PCS, Inc.*, 12 FCC Rcd. 6441, 6445, ¶ 10 (1997) (foreign ownership restrictions under Section 310(b)(4)).

nor can it unilaterally make any long-term policy decisions for the Company. Simply stated, Liberty Media currently does not control Sirius XM.

IV. CONCLUSION

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

Respectfully Submitted,

A handwritten signature in cursive script, reading "Richard E. Wiley", is written over a horizontal line.

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March 30, 2012

CERTIFICATE OF SERVICE

I, Jackie Martin, do hereby certify that on this 30th day of March 2012, I caused copies of the foregoing "Petition to Dismiss or Deny" to be delivered to the following via First Class U.S. mail or email:

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