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* Control of Sirius XM Radio Inc.	SAT-STA-20120320-00054
	SAT-STA-20120320-00055
	SAT-STA-20120320-00056
	ULS File Nos. 0005137812 and 0005137854
	Experimental License File Nos. (TBD)

OPPOSITION TO PETITION TO DISMISS OR DENY
APPLICATION FOR CONSENT
TO TRANSFER OF *DE FACTO* CONTROL

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Summary

In its Petition, Sirius XM Radio Inc. ("Sirius") argues that the Commission should dismiss or deny the applications for consent to transfer of *de facto* control filed by Liberty Media because: (a) Liberty Media "is not in *de facto* control of Sirius;" and (b) the applications contain "a number of fundamental procedural defects." Petition at 6. The Commission should reject the Sirius Petition because Section 310(d) of the Communications Act requires ***prior*** Commission approval before an applicant may exercise control over a Commission licensee, so any proposed transferee that is "in *de facto* control" of the licensee at the time it files it application would be in violation of the statute. Sirius cannot preclude Commission consideration of the Liberty Media transfer of control applications by withholding passwords and other information needed to utilize the Commission's electronic application filing systems and then claiming that the applications are "procedurally defective" because Liberty Media could not use the standard electronic application forms.

Liberty Media currently holds five of 13 seats on the Sirius Board of Directors, as well as a 40% equity interest in Sirius in the form of Series B Preferred Shares. More importantly, the voting restrictions and other limitations on Liberty Media's corporate conduct that are contained in the 2009 Investment Agreement expired on March 6, 2012. The expiration of those restrictions, combined with the relative size of Liberty Media's equity interest in Sirius, enables Liberty Media to take a variety of actions that even Sirius concedes "could ultimately result in a transfer of control" of Sirius. Petition at 19-21. However, Sirius contends that, because Liberty Media has not yet taken any action to assert control over Sirius, it is precluded from filing an application seeking the Commission consent required under Section 310(d) before taking any such action. *Id.*

The Commission repeatedly has held (including as recently as 2008 in a case involving Liberty Media and DIRECTV) that equity interests of 35 - 40% in a publicly traded company whose stock ownership is otherwise widely dispersed confer *de facto* control over the company. In fact, the record of actual voting by Sirius shareholders at the two most recent annual shareholder meetings, as reported by Sirius to the Securities and Exchange Commission, readily demonstrates that Liberty Media's equity interest in Sirius: (a) currently is more than sufficient to determine the outcome of matters submitted to a vote of the Sirius shareholders; and (b) if fully converted, would represent approximately two to three times the number of votes actually cast (whether for, against or abstaining) in the election of Sirius directors. Consistent with the requirements of Section 310(d) and the Commission's prior precedent, Liberty Media has applied for prior Commission approval before taking actions that result in *de facto* control of Sirius.

Sirius refused to cooperate in the filing of the transfer of control applications. Petition at 14. However, the Commission cannot cede to its licensees the power to preclude consideration of an application seeking Commission consent to a transfer of control pursuant to the Communications Act by unilaterally precluding use of the Commission's electronic application filing system. Finally, the Sirius Petition is not supported by affidavit as required by the statute and the Commission's Rules and is unauthorized because the Commission has not yet issued a Public Notice regarding the Liberty Media applications.

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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. (TBD)

OPPOSITION TO PETITION TO DISMISS OR DENY
APPLICATION FOR CONSENT
TO TRANSFER OF *DE FACTO* CONTROL

Liberty Media Corporation ("Liberty Media") opposes the Petition to Dismiss or Deny filed by Sirius XM Radio Inc. ("Sirius") on March 30, 2012 ("Sirius Petition"), which seeks dismissal or denial of the above-referenced applications for consent to transfer of *de facto* control of Sirius to Liberty Media (collectively, "Application"). The Sirius Petition is based upon plainly inapplicable Commission precedent and presents no legal or factual basis for denying the Application. The Sirius Petition also is procedurally defective.

Sirius does not dispute that Liberty Media effectively holds a 40% interest in Sirius, which the Commission repeatedly has found to provide a "*de facto* controlling interest" in public corporations with widely-dispersed ownership interests. In fact, Sirius concedes that, as a result of the expiration of restrictions in the 2009 Investment Agreement on Liberty Media's corporate conduct and voting rights, Liberty Media now is free to take "further actions that

could ultimately result in a transfer of control" of Sirius (Sirius Petition at 20), and Section 310(d) of the Communications Act requires Liberty Media to obtain prior Commission approval for any such transfer of control. Grant of the Sirius Petition and dismissal of the Application, on the grounds that "Liberty Media does not possess control of the Sirius XM Board" and, therefore, "[n]o *de facto* transfer has occurred" to date (Sirius Petition at 3, 14), effectively would require Liberty Media to violate the Communications Act by asserting *de facto* control of Sirius before filing an application for permission to do so -- contrary to the controlling statute, regulations, and consistent Commission precedent. Finally, any claimed "procedural deficiencies" in the Application are the direct result of Sirius' refusal to cooperate in filing standard electronic FCC application forms. Sirius cannot preclude Commission consideration of applications required by the Communications Act simply by obstructing the filing of such applications.

Factual Background

Liberty Media's Ownership Interest In Sirius

Liberty Radio, LLC ("Liberty Radio"), an indirect wholly-owned subsidiary of Liberty Media, entered into an Investment Agreement with Sirius, dated February 17, 2009 ("Investment Agreement"), pursuant to which Sirius issued to Liberty Radio: (a) 1,000,000 shares of convertible Series B-1 Preferred Stock; and (b) 11,500,000 shares of convertible Series B-2 Preferred Stock.[1] The Series B-2 Preferred Shares subsequently were converted to Series B-1 Preferred Shares, such that Liberty Media currently holds 12,500,000 Series B-1 Preferred Shares. The Investment Agreement recites, and Sirius concedes in its Petition

[1] A copy of the Investment Agreement is annexed as Exhibit 1 to the accompanying Declaration of Craig Troyer ("Troyer Dec.").

at 3 n.3, that the Series B Preferred Shares represent, on an as-converted basis, approximately 40% of the total outstanding common shares of Sirius. Investment Agreement at §3.2(c).

Prior Investment Agreement Restrictions

The Investment Agreement includes certain provisions pursuant to which Liberty Radio agreed that, prior to "the third anniversary of the Closing Date" (*i.e.* March 6, 2012) and subject to the provisions of Section 4.1(d), Liberty Radio and its Affiliates would not:

> (1) "enter into or agree, offer, propose or seek...to enter into, or otherwise be involved in or part of, any acquisition transaction, merger or other business combination relating to all or part of the Company or any of the Company Subsidiaries or any acquisition transaction for all or part of the assets of the Company or any Company Subsidiary or any of their respective businesses;"
>
> (2) "make, or in any way participate in, any 'solicitation' of 'proxies'...to vote, or seek to advise or influence any person or entity with respect to the voting of, any voting securities" of Sirius;[2] or
>
> (3) "call or seek to call a meeting of the stockholders of the Company or any of the Company Subsidiaries or initiate any stockholder proposal for action by stockholders of the Company or any of the Company Subsidiaries, form, join or in any way participate in a 'group'...with respect to any voting securities of the Company, or seek, propose or otherwise act alone or in concert with others, to influence or control the management, board of directors or policies of the Company or any Company Subsidiaries," again provided "that this subsection shall not be deemed to restrict the Preferred Stock Directors from participating as members of the Board of Directors and any committees thereof in their capacity as such."

Investment Agreement, §4.1(c).

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[2] The Investment Agreement states that "this subsection shall not be deemed to restrict (x) the Preferred Stock Directors from participating as members of the Board of Directors and any committees thereof in their capacity as such or (y) any Liberty Party from opposing publicly or privately, voting against and encouraging others to vote against any proposal of a third party regarding a merger or other business combination, or opposing publicly or privately any tender or exchange offer, regardless of whether such proposal or offer is supported by the Board of Directors." Investment Agreement, §4.1(c)(2). The Certificates of Designations regarding Liberty Media's Series B Preferred Shares provide that Liberty Media may designate a certain number of directors on the Sirius Board ("Preferred Stock Directors"), depending upon the number of Preferred Shares outstanding and the size of the Sirius Board. *See* Certificate of Designations of Convertible Perpetual Preferred Stock, Series B-1 of Sirius XM Radio Inc., §11. Currently, Liberty Media designates five of the 13 members of the Sirius Board of Directors. Copies of the Certificates of Designations regarding the Series B-1 and B-2 Preferred Stock are annexed as Exhibits 2 and 3, respectively, to the Troyer Dec.

The Investment Agreement also placed restrictions on Liberty Media's voting on certain matters. Specifically, Liberty Media agreed that, prior to the third anniversary of the Closing:

> (a) "Purchaser and each Liberty Party shall vote, or cause to be voted, or execute written consents with respect to, any shares of Common Stock that it Beneficially Owns (and which are entitled to vote on such matter) 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 Directors" of Sirius; and
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> (b) "Other than with respect to the right to designate the Preferred Stock Directors, neither Purchaser nor any Liberty Party shall (i) nominate or designate, (ii) vote for, or (iii) make, or in any way participate, directly or indirectly, in any 'solicitation' of 'proxies' to vote (as such terms are used in the rules of the SEC) or seek to advise or influence any person with respect to the voting of, any voting securities in respect of the election of, any candidate for election or appointment as a director except as provided in this Section 4.9."

Investment Agreement, §4.9. However, Section 4.9 does not "restrict the Preferred Stock Directors from participating as members of the Board of Directors and any committees thereof in their capacity as such." *Id.*

2009 Commission Inquiry Regarding *De Facto* Control

Shortly after the Liberty Media/Sirius transaction was announced in 2009, the Commission staff informally inquired whether the transaction constituted a transfer of *de facto* control of Sirius. At that time, respective counsel for Sirius and Liberty Media reviewed in detail with the Commission staff the provisions of Sections 4.1 and 4.9 of the Investment Agreement, which precluded Liberty Media's *de facto* control of Sirius, as well as other provisions of the Investment Agreement and the two Certificates of Designations regarding the Series B-1 and B-2 Preferred Shares. After reviewing these provisions and certain investor protections afforded to Liberty Media under the terms of the Investment Agreement and Certificates of Designations, the staff requested that Liberty Media confirm that it would not exercise *de facto* control of Sirius. By letter dated April 20, 2009, counsel for Liberty Media

confirmed that, consistent with the provisions of the Investment Agreement and the Certificates of Designations, "Liberty Media and those parties defined as 'Liberty Parties' in the Investment Agreement will not exercise *de facto* control over Sirius and have no intention of doing so." The letter further stated that "[i]n the event that the facts and circumstances change in the future, Liberty Media will file those applications with the FCC, if any, that are necessary and appropriate." Letter from Robert L. Hoegle, Counsel for Liberty Media Corporation, to John Giusti, Acting Bureau Chief, International Bureau (Apr. 20, 2009) ("April 2009 Letter"), a copy of which is annexed as Exhibit 4 to the Troyer Dec.

Expiration of Investment Agreement Restrictions

The provisions of Section 4.1(c) and Section 4.9 of the Investment Agreement described above expired on March 6, 2012 (the third anniversary of Closing Date of transaction).[3] Thus, Liberty Media now holds Preferred Stock that entitles it to approximately 40% of the stockholder vote at Sirius on all matters other than the election of common directors (and entitles Liberty Media to proportional representation on the Board of Directors).

[3] Even before expiration of the limitations on Liberty Media's conduct and voting rights contained in Sections 4.1 and 4.9 of the Investment Agreement, Sirius included the following statement concerning Liberty Media in the "Risk Factors" section of its 2011 Form-10K filed with the Securities and Exchange Commission ("SEC") on February 9, 2012:

> **Liberty Media Corporation has significant influence over our business and affairs and its interests may differ from ours.** Liberty Media Corporation holds preferred stock that is convertible into 2,586,976,000 shares of common stock. Pursuant to the terms of the preferred stock held by Liberty Media, we cannot take certain actions, such as certain issuances of equity or debt securities, without the consent of Liberty Media. Additionally, Liberty Media has the right to designate a percentage of our board of directors proportional to its interest. As a result, Liberty Media has significant influence over our business and affairs. The interests of Liberty Media may differ from our interests. The extent of Liberty Media's stock ownership in us also may have the effect of discouraging offers to acquire control of us. **Under its investment agreement, Liberty Media is subject to certain standstill provisions which expire in March 2012.**

Id. at 18 (emphasis added).

The Preferred Stock is convertible at Liberty Media's option, at any time,[4] into shares of common stock that would constitute approximately 40% of the common shares outstanding (after giving effect to such conversion) in a publicly traded corporation in which only one other shareholder "owns" more than 5% of its shares.[5] More importantly, with the expiration of the restrictions in the Investment Agreement, Liberty Media now: (a) is no longer contractually prohibited from participating in a "group" with respect to voting securities of Sirius; (b) may act alone or with others "to influence or control the management, board of directors or policies of the Company or any Company Subsidiaries;" (c) is no longer obligated to vote in favor of director candidates recommended by the Nominating and Corporate Governance Committee of the Sirius Board; (d) is free to nominate, vote for, and to solicit proxies for its own slate of directors, and to influence the votes of other shareholders of the company; (e) may call a meeting of the stockholders of the Company or initiate any stockholder proposal for action by

[4] Section 7 of the Certificate of Designations applicable to the Series B-1 Preferred Shares held by Liberty Media states that the shares are convertible "at the option of the Holder thereof, at any time" and that the "Conversion Date" for such shares is "the date of receipt" by the Company of the Preferred Share Certificates, together with a notice "that such Holder elects to convert" the Preferred Shares being submitted. Section 8 states that "[o]n the Conversion Date with respect to any share of Series B-1 Preferred Stock, certificates representing shares of common stock shall be promptly issued and delivered to the Holder thereof or such Holder's designee upon presentation and surrender of the certificate evidencing the Series B-1 Preferred Stock to the Company and, if required, the furnishing of appropriate endorsements and transfer documents and the payment of transfer and similar taxes." In addition to the protections afforded under the Certificates of Designations, the Preferred Shares may vote, on an as-converted basis, with the holders of Common Stock on all matters brought to a shareholder vote, other than the election of the Non-Preferred Stock Directors.

[5] In its Application, Liberty Media stated that "[t]o the best of Liberty Media's knowledge, no other shareholder of Sirius owns 5% of its outstanding common stock." Application at 2. Ignoring the qualifying language in the Application, Sirius claims that "Liberty Media's statement that 'no other shareholder [of Sirius XM] owns 5 percent of its outstanding common stock' is inaccurate" because "Wellington Management Company, LLP has disclosed a 5.52% interest in Sirius XM." Sirius Petition at 4, n.3. In a Schedule 13G filed with the SEC on February 14, 2012, Wellington Management Company LLP stated that, as of December 31, 2011, "in its capacity as investment advisor, [it] may be deemed to beneficially own 206,920,324 shares" of Sirius, "which are held of record by clients of Wellington Management." In the same filing, Wellington stated that the number of those shares over which it holds the "sole power to vote or to direct the vote" is "0." *See* Wellington Management Company LLP Schedule 13G, February 14, 2012, *available at* http://www.sec.gov/Archives/edgar/data/902219/000090221912000401/sec_filing.htm.

the stockholders;[6] and (f) is free to purchase additional stock in Sirius. In short, there are no longer any contractual restrictions upon Liberty Media's use of its equity ownership to assert control over Sirius, its board of directors and its policies.

Sirius concedes in its Petition that the "expiration of the Investment Agreement Provisions permits Liberty Media to take certain further actions that could ultimately result in a transfer of control...." Sirius Petition at 19-20. In fact, Sirius lists in its Petition many of the same actions listed above that Liberty Media now is free to take in seeking "to control the management, board of directors or policies of Sirius." *Id.* at 20. However, Sirius claims that because Liberty Media has not yet taken any of those actions to assert control, it is precluded from applying for Commission consent to take them. *Id.* To the contrary, Liberty Media has applied for Commission consent to the transfer of *de facto* control of Sirius because Section 310(d) requires *prior* approval for any transfer of *de facto* control, not a filing informing the Commission of such transfer after the fact.

Argument

I. Liberty Media Seeks Prior FCC Consent to the Transfer of *De Facto* Control of Sirius As Required by Section 310(d).

Section 310(d) of the Communications Act, 47 U.S.C. §310(d), states in relevant part that "[n]o construction permit or station license, or any rights thereunder, shall be transferred,

[6] The Sirius Certificate of Incorporation states that the "business and affairs of the Corporation shall be managed by or under the direction of the Board of Directors" and that "directors need not be elected by ballot unless required by the bylaws." Amended and Restated Certificate of Incorporation at Article Seventh. The Certificate of Incorporation also prohibits cumulative voting in the election of directors. *Id.* at Article Fifth. The Sirius By-Laws state that "[s]pecial meetings of the stockholders *shall be called* at any time by the Secretary or any other officer, *whenever directed by not less than two members of the Board of Directors.*" Article I, Section 2 (emphasis added). "Nominations of persons for election to the Board of Directors may be made at a special meeting of stockholders at which directors are to be elected pursuant to the corporation's notice of meeting...by any stockholder of the corporation who is entitled to vote at the meeting...." Article I, Section 11.B. Stockholders can act by written consent or by requiring a special meeting and specifying stockholder actions to be voted upon at the meeting. Copies of the Amended and Restated Certificate of Incorporation and the Amended and Restated Bylaws of Sirius are annexed as Exhibits 5 and 6, respectively, to the Troyer Dec.

assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." The statute expressly prohibits any transfer of control of a radio station licensee without *prior* Commission approval, and the Commission "has consistently interpreted Section 310(d) as requiring prior Commission approval when licensees transfer either *de jure* or *de facto* control of their licenses to third parties." *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd. 20604 (2003), at ¶46 n.101; s*ee also In Re Tender Offers and Proxy Contests,* 59 RR 2d 1536 (1986) ("*Tender Offer Policy Statement*"), at ¶10 n.30 ("[i]t is well-established that transfers involving de facto and well as de jure control are cognizable under Section 310"); *Lorain Journal Co. v. FCC,* 351 F.2d 824, 828-29 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966) (affirming Commission precedent that "control" under Section 310(d) refers to both *de jure* and *de facto* control). Further, the Commission and the Courts have long advised "that in doubtful and borderline cases, as to whether a proposed transaction would result in a transfer of control within the meaning of Section 310(b), doubt 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." *Lorain Journal,* 351 F.2d at 830 (*citing Public Notice on Procedure of Transfer and Assignment of Licenses*, 4 R.R. 342 (1948)).

Sirius acknowledges that the expiration of the Investment Agreement provisions allows Liberty Media "to take additional steps to acquire control of Sirius...should it decide to take those steps." Sirius Petition at 9. Among other things, Sirius concedes that Liberty Media

now can: (1) enter into or seek to enter into a merger, acquisition, asset sale, or other business combination; (2) seek to control the management, board of directors or policies of Sirius; (3) join a "group" with respect to the voting securities of Sirius; (4) call a meeting of the Sirius stockholders; (5) initiate a stockholder proposal; and (6) solicit proxies to vote with respect to Sirius securities. *Id.* at 20. In addition, Sirius concedes that Liberty Media is free to "purchas[e] additional shares" of Sirius. *Id.* at 2. Sirius further concedes that such actions by Liberty Media "could ultimately result in a transfer of control" of Sirius. *Id.* at 19-20. However, Sirius argues that because Liberty Media has not yet taken "one or more of those steps," it currently "is not in a position to dictate the day-to-day operations of Sirius XM" and, therefore, "Liberty Media currently does not control Sirius XM." *Id.* at 20-21. Because Section 310(d) of the Communications Act requires *prior* Commission approval for any transfer of control, Liberty Media accordingly has filed the current Application to obtain the required approval before taking any such actions to exert *de facto* control over Sirius.[7]

The Commission should not allow Sirius to obstruct the Commission's statutorily-mandated prior review, and public interest analysis, of a proposed transfer of *de facto* control. The Commission repeatedly has stated that it is "not in the public interest for [its] administrative processes to be utilized, either by design or by unintended result, in a manner which favors either the incumbent or challenger" in disputes over corporate control of Commission licensees. *Tender Offer Policy Statement* at ¶6. Rather, the Commission has determined that its processes should "promote strict governmental neutrality" in such disputes.

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[7] *See Trustees of the University of Pennsylvania*, 69 FCC 2d 1394 (1978), at ¶7 ("Congress has demonstrated its special concern that ultimate responsibility rests with the party licensed by this Commission by imposing requirements that licensees notify the Commission when a 'transfer of control' over a station was proposed and by further requiring a Commission finding that such a transfer will be in the public interest, convenience and necessity before it can be consummated.")

Id. Sirius cannot prevent Commission review of applications required by Section 310(d) of the Communications Act, nor may it use the Commission's administrative application filing procedures to promote the interests of incumbent management, simply by refusing to provide passwords, thereby precluding the filing of standard form electronic transfer applications at the Commission.

Finally, contrary to Sirius' assertion, Liberty Media's transfer Application presents no "state law corporate governance issues" for the Commission to adjudicate. Sirius Petition at 2. As set forth above at 5-7, the size of Liberty Media's ownership interest in Sirius and the various ways in which it may act to exercise control of Sirius are undisputed. Recognizing that it now is free to take "actions that could ultimately result in a transfer of control" of Sirius, Liberty Media is seeking prior Commission approval before taking such actions as required by Section 310(d) of the Communications Act.

II. Liberty Media Has the Ability to Exert *De Facto* Control Over Sirius.

Sirius argues that the Application should be dismissed or denied because "Liberty Media does not have *de facto* control of Sirius XM." Sirius Petition at 9. It is true that Liberty Media currently has not exercised *de facto* control over Sirius, but that is required of any applicant seeking Commission consent to the transfer of control of a licensee at the time it files its application, regardless of whether the applicant is seeking *de facto* or *de jure* control. If an applicant exercised such control, it would violate Section 310(d) for asserting control over the licensee prior to obtaining Commission approval. Thus, Sirius' claim that "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" (Sirius Petition at 6) is a true statement, but is completely irrelevant. If Liberty Media had taken actions to assert control over Sirius and to force Sirius

to provide the passwords needed to file standard electronic transfer of control applications, it would have been in violation of Section 310(d) because it would have acquired control prior to obtaining Commission approval. The issue is whether Liberty Media, now free of the limitations contained in the Investment Agreement,[8] can take actions that "could ultimately result in a transfer of control" of Sirius once the Commission has approved the Application. Even Sirius concedes that Liberty Media now is free to take such actions (Sirius Petition at 19-20), and 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.[9]

A. Liberty Media's Ownership Interest in Sirius Exceeds the Levels Found to Constitute *De Facto* Control.

The Commission need look no further than its decisions in *General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corporation Limited, Transferee,* 19 FCC Rcd. 473 (2004) ("*News Corp. Order*") and *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*") for the proposition that a 40% shareholder has *de facto* control over a public company whose stock is otherwise widely held. In the *News Corp. Order*, the Commission considered the transfer of a 34% interest in

[8] As set forth in its Application at 10, Liberty Media has committed to abide by the Standstill Restrictions and the Voting Restrictions described in its Application and to refrain from acquiring shares of the Common Stock of Sirius that would result in Liberty Media's Beneficial Ownership (as defined in Section 5.9(g) of the Investment Agreement) exceeding 49.9% until the Commission has acted upon Liberty Media's Application, the Application is withdrawn, or circumstances change and Liberty Media advises the Commission of the changed circumstances.

[9] Sirius erroneously cites a portion of the Liberty Media Form 10-K discussing the management of Liberty Media's business affiliates in support of its argument that "the expiration of the Investment Agreement Provisions changed no facts relevant to the FCC's *de facto* control analysis." Sirius Petition at 17-18. The Liberty Media Form 10-K was an annual report for the period ending December 31, 2011. Liberty Media's contractual rights changed substantially as of March 6, 2012. As noted above, Sirius itself acknowledges that Liberty Media now can initiate a number of actions that could lead to a transfer of control of Sirius. Sirius Petition at 20.

DIRECTV to News Corp. to constitute a transfer of *de facto* control where "[n]o single shareholder will have a *de jure* controlling interest in the company either through a majority interest in voting stock or majority representation on the board." *News Corp. Order* at ¶14. Sirius attempts to distinguish the *News Corp. Order* based on the fact that Chase Carey, a "former employee" of News Corp. would be the CEO of DIRECTV and Rupert Murdoch would serve as the Chairman of the Board.[10] Sirius Petition at 16-17. However, the Commission in that case also stated that 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).[11]

Moreover, the applicants in the *News Corp. Order* sought to avoid the imposition of conditions concerning related party transactions (between DIRECTV and Fox-affiliated programmers) by arguing that the DIRECTV Board was comprised of a majority of independent directors and the Audit Committee was comprised exclusively of independent directors and would be required to review all related-party transactions. *News Corp. Order* at ¶¶93-96. The Commission expressly rejected that argument, finding "that News Corp.'s influence is likely to be such that an independent director will be cautious before taking any

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[10] The Commission noted that the post-transaction DIRECTV Board would be comprised of 11 members, 6 of whom are independent. *News Corp. Order* at ¶14. The Commission also stated 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." *Id.* at n.45.

[11] The Commission found that the transaction would result in News Corp. holding a 34% interest in Hughes, three General Motors employee benefit trusts (managed by an independent trustee, U.S. Trust, which "will have sole discretion in exercising those voting rights") holding a 20% interest, and the remaining 46% interest being held by the general public. *News Corp. Order* at ¶¶1, 9, 13. In contrast, the single largest "owner" of Sirius shares after Liberty Media is an investment advisor which "may be deemed to beneficially own" less than a 6% interest in Sirius, based on the shares beneficially owned by its clients, and which has no unilateral authority to vote the shares.

step that could cause offense to News Corp. for fear that he or she might be ousted." *Id.* at ¶97. News Corp. argued that with only 34% of the votes, it could not oust and replace an independent director without getting "other shareholders to cast their votes in favor of the resolution." *Id.* at ¶98. However, the Commission stated that it did "not think that it is far-fetched to suggest that a sufficient number of shareholders might follow the lead of the largest single stockholder and vote the way that News Corp. voted." *Id.*

The *Liberty Media-DIRECTV Order* likewise establishes that a 40% ownership interest in a licensee with dispersed public ownership is sufficient to constitute *de facto* control. Contrary to Sirius' assertion that the Commission "did not evaluate the *de facto* control issue" in the *Liberty Media-DIRECTV Order* (Sirius Petition at 16), the Commission expressly stated that 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." The Commission found that, upon completion of the proposed transaction, "Liberty Media will have a 40.36% interest in DIRECTV, making it the largest stockholder by far," and "**[b]y *virtue of this interest,*** Liberty Media will have *de facto* control over DIRECTV." *Liberty Media-DIRECTV Order* at ¶2 (emphasis added).[12] It made that finding despite the fact that Liberty Media would appoint only "three representatives to DIRECTV's 11-member Board of Directors to replace resigning News Corp. directors" and Chase Carey (a former News Corp. employee) would remain as the President, CEO and a director of DIRECTV. *Id.*

The Commission has determined that similar equity interests are sufficient to constitute *de facto* control in other contexts. For example, in *Bartell Media Corp.*, 19 FCC 2d 890

[12] The Commission noted that it previously had found "that the acquisition of a 34 percent interest in Hughes Electronics Corporation by News Corp. would make it owner of the single largest block of shares in Hughes, ***thus providing News Corp. with a de facto controlling interest over Hughes*** and its subsidiaries, including wholly-owned subsidiary DIRECTV." *Liberty Media-DIRECTV Order* at ¶2 n.7 (emphasis added).

(1969), the Commission granted an application for transfer of control to Downe Communications, Inc. ("DCI"), which held "approximately 38 percent of the outstanding stock" of Bartell Media, Corp., made the public interest finding that DCI was qualified to be a Commission licensee, and instructed DCI to inform the Commission subsequent to the Order "that is has acquired control of Bartell Media Corp." *Id.* at 897, 899. In other contexts, the Commission has observed that ownership levels as little as "a 20 percent interest held by a single entity would create a possibility of *de facto* control." *Broadband Personal Communications Services (Competitive Bidding and Ownership Rules)*, 11 FCC Rcd. 7824 (1996), at ¶118, *recon.* 12 FCC Rcd. 14031 (1997), *aff'd sub nom., Bell South Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999). It is undisputed that Liberty Media holds a 40% interest in Sirius, an interest equal to or greater than the percentage interest recognized by the Commission to constitute *de facto* control of a publicly traded company whose stock is widely held.

B. Because Not All Sirius Shareholders Vote, Liberty Media's Ownership Interest Is Even More Significant.

Because only a fraction of public shareholders actually vote their shares, Liberty Media's 40% ownership interest in Sirius through the Series B Preferred Shares effectively would provide voting control of Sirius without more. As the Commission recognized in *Lockheed Martin Corp./Regulus, LLC Acquisition of Comsat Government Systems, Inc.*, 14 FCC Rcd. 15816 (1999) ("*Comsat/Lockheed*"), at ¶34, "it is likely that a substantial percentage of shareholders do not participate in any given shareholder vote," such that the practical impact of large voting blocks is increased.

The Commission's general observation is consistent with the reported empirical data. In a 2010 review of the U.S. proxy system, the SEC stated that the "[r]etail investor

participation rates in the proxy voting process historically have been low." *See* Concept Release on the U.S. Proxy System, 75 Fed. Reg. 42982, 43002 (July 20, 2010). According to a 2007 SEC Roundtable on Proxy Voting Mechanics, most broker dealers reported that only a "small percentage of their retail customers actually vote" and that the "retail voting rate averages 30 to 40 percent." *See* Briefing Paper: Roundtable on Proxy Voting Mechanics," (May 24, 2007), *available at http://www.sec.gov/spotlight/proxyprocess/proxyvotingbrief.htm.*

The shareholder votes cast in the election of Sirius directors in 2010 and 2011 (as reported by Sirius)[13] are consistent with the statistics reported by the SEC:

	Common Stock Outstanding on Record Date	**Total Shares Actually Voted**	**Percentage of Outstanding Shares Actually Voted**
2010	3,885,488,043	884,369,496	23%
2011	3,943,147,483	1,310,670,597	33%

In the Sirius director elections in 2010, only 884,369,496 shares actually were voted (including abstentions), representing only 23% of the outstanding common shares entitled to vote.[14] If converted for the 2010 elections, the Series B Preferred Shares held by Liberty Media would have represented a total of approximately 2,586,976,762 common shares, nearly three times the number of shares actually voted in the director elections. Even if Liberty Media converted

[13] Sirius Form 8-K, filed June 1, 2010; Sirius Form 8-K, filed May 27, 2011. Copies of the Sirius Form 8-Ks are annexed as Exhibit 7 to the Troyer Dec.

[14] The number of actual votes reported does not include "Broker Non-Votes," which occur when the beneficial owner of shares held by a brokerage firm fails to complete a proxy form or otherwise fails to instruct the brokerage firm as to how his or her shares should be voted in an election of directors. Brokers only may "vote shares held for a beneficial holder on routine matters." For votes on non-routine matters, such as, for example, electing directors and relating to compensation, "Broker Non-Votes" only are "counted as present for purposes of determining whether enough votes are present to hold the annual meeting." Sirius Schedule 14a, filed April 12, 2011 at 3, available at http://www.sec.gov/Archives/edgar/data/908937/000095012311034969/y90785def14a.htm.

only 50% of the Series B Preferred Shares, it would have cast nearly 1.3 billion votes – far more than the total number of votes actually cast for directors in that election. In the 2011 Sirius director elections, 1,310,670,597 shares actually were voted (including abstentions), or only approximately 33% of the total common shares outstanding and entitled to vote. If converted for the 2011 elections, the Series B Preferred Shares held by Liberty Media would have represented a total of nearly twice the number of shares actually voted in the director elections.[15] Thus, because only a portion of the total outstanding common shares of Sirius actually are voted in the election of directors, the significance of Liberty Media's voting interest is magnified. Further, as noted by the Commission in the *News Corp. Order*, it is not "far-fetched to suggest that a sufficient number of shareholders might follow the lead of the largest single stockholder." *News Corp. Order* at ¶98.

Moreover, the Form 8-Ks filed by Sirius in 2010 and 2011 show that certain policies were put to a vote of the shareholders, including the holders of the Series B Preferred Stock voting on an as-converted basis. In 2010, for example, the shareholders were asked to approve "a short-term rights plan designed to preserve potential tax benefits." The total votes cast in favor of approval were 3,392,831,756 (including the votes cast by Liberty Media on an as-converted basis), the total votes cast against approval were 70,146,313, and abstentions totaled 8,368,189. By casting its 2,586,976,762 votes against the plan rather than for it, Liberty Media could have defeated the proposal overwhelmingly. Likewise, the 2011 Form 8-K reports that that the Sirius shareholders were asked to approve "in a non-binding advisory vote,

[15] However, pursuant to the then-applicable restrictions contained in the Investment Agreement, Liberty Media would have been required to vote any such common shares in favor of the slate of directors nominated by Sirius and was prohibited from taking actions "alone or in concert with others, to influence or control the management, board of directors, or policies" of Sirius. Investment Agreement, §§4.1(c)(3), 4.9.

the compensation paid to our named executive officers as disclosed in the proxy statement." The vote tallies reported in the Form 8-K on that issue again readily demonstrate that Liberty Media's vote could have changed the outcome.

Sirius contends that in order to "rise to the level of a transfer of control," a minority shareholder must be in a position to "'determine' the licensee's policies and operation" and argues that Liberty Media "lacks any ability to dominate Sirius XM's corporate affairs." Sirius Petition at 11, 15. However, the voting statistics set forth above readily demonstrate that the Liberty Media Series B Preferred Shares currently have sufficient voting power on as "as-converted" basis to determine the outcome of matters put to a vote of the Sirius shareholders, and upon conversion of some or all of its Preferred Shares, Liberty Media would have sufficient voting power to determine the outcome of the election of the Sirius Board of Directors. Under consistent Commission precedent, absent contractual restrictions on the exercise of its voting and other corporate rights, Liberty Media's 40% ownership interest plainly is sufficient to constitute *de facto* control of Sirius.

C. The Decisions Relied Upon by Sirius Are Inapplicable.

In support of its Petition, Sirius cites several Commission decisions that clearly have no application to the present facts. For example, Sirius repeatedly contends that the Commission considers issues of *de facto* control only by examining "facts and events that have occurred and not speculation as to what might occur in the future." Sirius Petition at 12. However, the decisions cited by Sirius involved allegations that an *unauthorized* transfer of control already had taken place in violation of Section 310(d). Liberty Media has filed the present Application seeking prior Commission approval precisely to avoid any unauthorized transfer of control.

For example, Sirius relies on the Commission's decision in *CBS Inc.*, 1 FCC Rcd. 1025 (1986), for the proposition that "[e]ven 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,'" there was no transfer of *de facto* control. Sirius Petition at 12 and n.30. In *CBS*, a third party public interest organization, Fairness in Media ("FIM"), filed a "Petition and Complaint" at the Commission on September 12, 1986 alleging that *de facto* control over CBS already had been transferred to Loews Corp. ("Loews") and its Chairman, Laurence Tisch ("Tisch") without prior FCC approval as required under Section 310(d). In support of its petition, FIM cited press reports that Loews that increased its ownership interest in CBS from 5% to 25% and that Preston Tisch (the President of Loews) and certain current and former executives and directors of CBS had been quoted in the press stating that Tisch intended to assert control over CBS. Two weeks later, FIM supplemented its filing by citing reports that Tisch had ousted the existing Chairman of CBS and had become the CEO of CBS. 1 FCC Rcd. at 1025.

CBS responded by stating that, at a CBS Board meeting on September 10, 1986, the outside directors and one inside director (Walter Cronkite) had decided to replace the CEO and to appoint Tisch as acting CEO until a new CEO could be selected. The Board also named William Paley as Acting Chairman and had established a "management committee" chaired by Tisch, but comprised of a majority of outside directors, to whom Tisch would report between Board meetings. CBS further stated that neither Paley nor the other Board members intended to cede control of the company to Tisch, "nor did he intend to assume control." 1 FCC Rcd. at 1025. Finally, Paley confirmed that he had no agreement with Tisch to vote their stock

together (the two controlled 33% of the shareholder votes) or to adopt a uniform position on matters presented to the Board. *Id.*

The Commission noted that allegations that a transfer of *de facto* control has occurred without prior Commission approval require the Commission to examine "events that already have occurred" because "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." 1 FCC Rcd. at 1026. Based on the information presented to it, the Commission was "unable to conclude that a de facto transfer of control has occurred" because Loews "is a minority CBS shareholder" and "[m]ore than 75% of the voting power and ownership of CBS remain with the general shareholders who 'retain ultimate and legal control' of the corporation." *Id.* Moreover, the Commission found no evidence "that would suggest that Mr. Tisch, himself a minority shareholder, has the sort of influence with the remaining shareholders that the Commission in the past has found to constitute de facto control." *Id.* Although Tisch's appointment as acting CEO "may affect working control of CBS," the Commission concluded that "does not mean that this event constitutes a transfer of control." *Id.* (emphasis in original). Thus, the Commission concluded that "the events, to date, do not constitute a transfer of control within the meaning of Section 310(d) of the Communications Act." *Id.* at 1027. Most significantly, the incumbent Board in *CBS* had expressly represented to the Commission that Tisch did "not intend to assume control" of CBS. In contrast, the incumbent Board of Sirius has not and cannot make such a representation regarding Liberty Media, which would, upon conversion, hold more than 40% of the outstanding voting power in Sirius (compared to Tisch's 25% in CBS), and already holds five of 13 Board seats.

In *American Mobile Radio Corp.*, 16 FCC Rcd. 21431 (2001) *("AMRC")*, cited in the Sirius Petition at 12, the Commission noted that the majority shareholder of the licensee's parent company, American Mobile Satellite Corporation ("AMSC"), and the parent company's minority shareholder WorldSpace, Inc. ("WorldSpace"), had applied to the FCC for prior consent to transfer control of the licensee to WorldSpace. 16 FCC Rcd. 21431, at ¶3. AMSC later announced that it would acquire WorldSpace's indirect minority interest in AMRC, so the parties then withdrew the pending transfer of control application. *Id.* The Commission's decision in *AMRC* arose in a very different procedural context and therefore offers little guidance to the Commission in reviewing Liberty Media's Application. Like *CBS*, *AMRC* involved third party assertions that an unauthorized transfer of control of a Commission licensee previously had occurred, and as a result, the Commission necessarily was required to perform a retrospective analysis of past events. *See AMRC,* 16 FCC Rcd. 21431 at ¶¶9-11. Here, Liberty Media seeks Commission consent to the transfer of *de facto* control of Sirius on a prospective basis, and Commission review and approval of the transfer of *de facto* control of Sirius to Liberty Media is required under Section 310(d) of the Communications Act. If anything, the *AMRC* decision supports Liberty Media's position that the transfer of *de facto* control requires *prior* Commission approval.

Sirius also cites *Comsat/Lockheed* for the proposition that "Lockheed Martin's 49% interest in Comsat 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." Sirius Petition at 15 n.43. However, Lockheed Martin was expressly prohibited by separate statute[16] from

[16] Lockheed Martin's ownership interest and level of control was expressly limited by the former Communications Satellite Act of 1962, 47 U.S.C. §731, et seq. ("Satellite Act"). As explained below, the Satellite Act imposed the following restrictions on ownership and control of Comsat: (1) "authorized carriers"

exercising *de facto* control over Comsat and from electing more than 3 of Comsat's 15 Board members absent Congressional action. None of those restrictions is present here.

In *Comsat/Lockheed*, Lockheed Martin had entered into a merger agreement with Comsat, pursuant to which Lockheed Martin agreed to acquire 100% of Comsat once Congress amended Section 304 of the Satellite Act to eliminate certain ownership restrictions. In the interim, the applicants sought Commission approval: (a) pursuant to Section 310(d) of the Communications Act, for Regulus, a subsidiary of Lockheed Martin, to acquire Comsat Government Systems, Inc. ("CGSI"), and the resulting transfer of control of CGSI; and (b) pursuant to the Satellite Act, for the acquisition by Regulus of a 49% equity interest in Comsat as an authorized common carrier, pending action by Congress to allow it to own 100 percent. The Commission stated that the ownership restrictions in Section 304 of the Satellite Act reflected a Congressional intent to prohibit any one entity from controlling Comsat. Consequently, if it were to determine that the acquisition of a 49% equity interest by Regulus would enable Regulus to exert *de facto* control over Comsat, it could not grant the application until Congress amended Section 304. 14 FCC Rcd. 15816, at ¶26.

After reviewing the agreements and the representations of the applicants, the Commission determined that Regulus' acquisition of a 49% ownership interest in Comsat would not enable Lockheed Martin to exert *de facto* control over Comsat. In reaching that determination, the Commission relied upon a number of factors that served to limit Lockheed Martin's ability to control the affairs of Comsat. For example, the parties included in their agreements "a number of limitations and commitments by both parties that would govern their

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were permitted in the aggregate to own up to 49% of the voting shares of Comsat; and (2) "authorized carriers" could not elect more than 3 directors of Comsat's 15-member board. *Comsat/Lockheed* at ¶16.

actions" until Congress amended the Satellite Act to permit Lockheed Martin to own 100% of Comsat. Among other things, those provisions: (a) required Comsat to continue doing business as usual and to refrain from taking any significant or unusual steps without Lockheed Martin's approval; and (b) prohibited Lockheed Martin from exercising control, directly or indirectly, over Comsat. *Comsat/Lockheed* at ¶33.

Although the Commission noted at the outset of its analysis that "[a]ccording to Commission precedent, a 49% stock purchase does not, in and of itself, indicate a transfer of control," it conceded that the precedent to which it referred "involved closely held corporations in which the remaining stock was held by a single owner, or by a closely held group such as a family." *Comsat/Lockheed* at ¶34.[17] In contrast to the closely-held corporations to which that precedent applied, the Commission conceded that in "a publicly traded corporation with a large number of shareholders, it is likely that a substantial percentage of shareholders do not participate in any given shareholder vote." *Id.* As a result, the Commission concluded that Lockheed Martin "would likely have more than 49 percent of the voting power based on shares actually voted in any one shareholder vote." *Id.* In addition, the Satellite Act prohibited any single non-common carrier shareholder of Comsat from owning more than 10% of the stock, and the Commission acknowledged that "most likely, none would own more than a few percent of the company." *Id.* Consequently, even with the voting restrictions placed upon Lockheed Martin in the agreements during the period prior to Congressional amendment of the Satellite Act, the Commission acknowledged that "the large

[17] The Commission specifically cited *Ellis Thompson Corp.*, 10 FCC Rcd. 12554 (1995), a decision by a Commission Administrative Law Judge in which 49.99% of the stock of a cellular licensee had been issued to other applicants for the cellular facility pursuant to a pre-lottery settlement agreement and Thompson owned the remaining 50.01%.

percentage ownership stake may, in the totality of the circumstances, reflect a substantial level of influence" over Comsat. *Id.*

The Commission then stated that Section 303 of the Satellite Act prohibited Lockheed Martin from asserting control over Comsat and designating more than 3 of the 15 members of the Comsat Board and that, for "publicly traded corporations like Comsat, it is the Board, rather than the shareholders, that is in actual control of policies and corporate affairs."[18] *Id.* at ¶35. The Commission further recited that the relevant agreements prohibited Lockheed Martin "from either becoming a member of a voting group or soliciting proxies that would pit it against the Comsat Board." *Comsat/Lockheed* at ¶34 n.82. As a result, despite its 49% equity stake in Comsat, Lockheed Martin could elect no more than 20% of the Board absent Congressional action to amend the Satellite Act and, therefore, "would be unable to dominate or control Comsat on the basis of its three directors." *Id.* Although the officers and other directors of Comsat certainly would be aware of "the Merger Agreement that contemplates Lockheed Martin becoming the new owner of Comsat" and "[c]ommon business sense dictates that this awareness would have some level of influence on their actions" (*id.* at ¶40), no merger could occur absent Congressional action, and the parties had agreed to a standstill in the interim. *Id.* at ¶38. Based on the totality of the circumstances, the Commission concluded that "no *de facto* transfer of control would occur based on the record before us." *Id.* at ¶41. Clearly, the statutory and contractual limitations applicable to Lockheed Martin do not apply to

[18] The Commission stated that Comsat is incorporated under District of Columbia law and that under the D.C. Business Corporation Act, the shareholders of a corporation "cannot act alone without board initiation except to effect exceptional decisions on behalf of the corporation." The Commission concluded that "where the board is the primary decision maker for most matters and where it maintains a flexible relationship regarding approval from shareholders, actual control may be more accurately determined based on the ability to influence the board rather than the ability to influence shareholder decisions." *Comsat/Lockheed* at ¶35 n.83. In contrast, Sirius is incorporated in Delaware, and its governing documents permit the shareholders to act by written consent and to amend the Bylaws.

Liberty Media here, rendering the *Comsat/Lockheed* case irrelevant to the Liberty Media Application.

Sirius also argues that, in *Peace Broadcasting Corp.*, 36 FCC 2d 675 (1972), the Commission was confronted with "circumstances similar to the instant case" and determined that the "transfer application was defective unless signed by all parties to the application." Sirius Petition at 8-9. In that case, the proposed transferee had made a loan to the licensee corporation that was secured by a pledge of the transferor's stock. The transferor had filed an action in state court seeking to preliminarily and permanently enjoin the transfer of his stock to the transferee. The Commission dismissed the transfer of control application because it concluded that the question of whether the proposed transferee, acting in his role "as escrow agent," would have "authority to transfer the stock is purely a matter of state law" that would be resolved in the pending lawsuit. 36 FCC 2d at 676. Here, in contrast, Sirius does not dispute that Liberty Media holds a 40% equity interest in Sirius and is free to take certain "actions that could ultimately result in a transfer of control" of Sirius.

III. Any Claimed Defects in the Application Resulted from Sirius' Refusal to Cooperate in the Preparation and Filing of the Application.

Liberty Media's Request for Waiver of Electronic Filing and Transferor/Licensee Signature Requirements for Applications for Consent to Transfer of *De Facto* Control ("Waiver Request") describes Liberty Media's efforts to obtain from Sirius the required passwords to facilitate the preparation and filing of standard electronic transfer of control application forms. Prior to the filing of the Application and the Waiver Request, Sirius confirmed that it would not provide the required passwords. *See* Waiver Request at 3-4 n.3. Liberty Media's FCC counsel consulted with staff of the Media, International and Wireless

Telecommunications Bureaus, and the Office of Engineering and Technology, regarding alternative application filing procedures in the absence of the Sirius passwords.

The International Bureau staff advised Liberty Media that, if Liberty Media intended to file the Application without the Sirius passwords, it should file the Form 312 applications as attachments to the special temporary authority ("STA") form available in the International Bureau Filing System ("IBFS"). Use of the STA form enabled Liberty Media unilaterally to file the Form 312 applications through IBFS. Wireless Telecommunications Bureau and Office of Engineering and Technology staff advised Liberty Media to file paper copies of the Form 603 and Form 703 transfer of control applications using manual procedures, along with a request for waiver of the electronic filing and signature requirements applicable to these applications, if Liberty Media decided to proceed with the application filings.

Thus, the alleged procedural defects in the Application cited in the Sirius Petition resulted directly from Sirius' refusal to cooperate in the preparation and filing of the electronic applications seeking FCC consent to the transfer of *de facto* control. As noted above, the Section 310(d) requirement to obtain prior approval of a transfer of control applies to both *de jure* and *de facto* control. Sirius' failure to cooperate in the electronic transfer application filing process caused Liberty Media to utilize alternative transfer application filing procedures (in consultation with FCC staff) to comply with the statutory obligation to obtain the Commission's prior consent to the transfer of *de facto* control of Sirius. Sirius cannot thwart Commission consideration of the statutorily-required transfer applications by obstructing the electronic filing process.

IV. The Sirius Petition Is Procedurally Defective.

The Sirius Petition does not comply with the applicable procedural requirements of Section 309 of the Communications Act and the Commission's Rules. Specifically, a petition to deny must contain specific allegations of fact, supported by affidavits of persons with personal knowledge of the allegations, that are sufficient to show that grant of the application would be *prima facie* inconsistent with the public interest. *See* 47 U.S.C. §309(d)(1); *AMRC*, 16 FCC Rcd. 21431, at ¶8. Sirius submitted no affidavit based upon personal knowledge to support any of the factual statements contained in its Petition, particularly the statements that: (a) "Liberty Media...lacks the ability to direct the Company's management or operations" (Sirius Petition at 9); (b) "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.*); and (c) "Liberty Media...lacks any ability to dominate Sirius XM's corporate affairs (*Id.* at 15).

In addition, Sirius' filing of its Petition prior to release of a public notice listing Liberty Media's transfer applications violated the statutory and regulatory requirements for petitions to deny. *See* 47 U.S.C. §309(d)(1); 47 C.F.R. §25.154(a)(2)("[p]etitions to deny...must...[b]e filed within thirty (30) days *after* the date of public notice announcing the acceptance for filing of the application...") (satellite and earth station transfer applications); 47 C.F.R. §1.939(a)(2)("[p]etitions to deny...must be filed no later than 30 days *after* the date of the Public Notice listing the application...as accepted for filing.") (wireless license transfer applications) (italics added). The Commission, therefore, may dismiss as procedurally defective a petition to deny that has been filed before the subject application appears on public notice. *See, e.g., In the Matter of Applications to Transfer Control of Licenses from Robert F.*

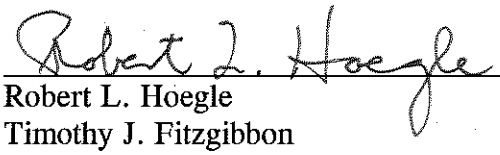
Broz to William B. Calcutt, 20 FCC Rcd. 8848 (WTB 2005), at ¶6 ("[T]he Applications have not appeared on public notice as accepted for filing; therefore, the Petition [to Deny]...filed by the Alpine Petitioners [is] procedurally defective. We therefore dismiss the Petition [to Deny]...as being improperly filed."). Thus, the Sirius Petition is procedurally defective and should be denied.

Conclusion

For the foregoing reasons, the Commission should dismiss or deny the Sirius Petition, consider Liberty Media's Application for consent to *de facto* control of Sirius on the merits, and grant the Application.

Respectfully submitted,

LIBERTY MEDIA CORPORATION

BY: 

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April 12, 2012

CERTIFICATE OF SERVICE

I, Thomas F. Bardo, do hereby certify that copies of the foregoing Opposition to Petition to Dismiss or Deny Application for Consent to Transfer of *De Facto* Control and Declaration of Craig Troyer in Support of Opposition to Petition to Dismiss or Deny Application for Consent to Transfer of *De Facto* Control were served by first class U.S. mail, postage prepaid, this 12th day of April 2012 on the following:

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